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84
846
No. 2332

United States
Circuit Court of Appeals
For the Ninth Circuit

H. A. and L. D. HOLLAND COMPANY,
a Corporation,

Appellant,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellee.

AND

GEORGE TURNER and BERTHA TURNER,
Husband and Wife.

Appellants,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellee.

AND

H. J. SHINN and PHOEBE SHINN,
Husband and Wife,

Appellants.

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellee.

AND

W. H. KIERNAN and CHRISTINE B. KIERNAN,
Husband and Wife,

Appellants,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellee.

Transcript of Record

UPON APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

FILED
NOV 10 1913

Records of U. S. Circuit
Court of appeals
847

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NAMES AND ADDRESSES OF SOLICITORS OF
RECORD.

TURNER & GERAGHTY, Columbia Building,
Spokane, Washington,

and

POST, AVERY & HIGGINS, Exchange National
Bank, Spokane, Washington,

Solicitors for Appellants.

GRAVES, KIZER & GRAVES, Old National Bank
Building, Spokane, Washington,

and

EDWARD J. CANNON, Old National Bank Building,
Spokane, Washington,

Solicitors for Defendant.

*In the District Court of the United States, in and for
the Eastern District of Washington.*

H. A. & L. D. HOLLAND COMPANY, a corpora-
tion,

Plaintiff.

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Defendant.

IN EQUITY.

To the Honorable the Judges of the District Court
of the United States, in and for the Eastern District
of Washington:

H. A. & L. D. Holland Company, a corporation,
duly organized and existing under the laws of the

State of Washington, with its chief place of business in the City of Spokane, Washington, brings this its bill, against the Northern Pacific Railway Company, a corporation, as defendant; and thereupon Plaintiff complains and says:

First: That the Plaintiff is a corporation duly organized and existing under the laws of the State of Washington, having its principal place of business in the City of Spokane, Washington, in the Eastern District of Washington, and is a citizen of said State of Washington, and an inhabitant of the Eastern District thereof; that said defendant, the Northern Pacific Railway Company, named as defendant in the caption, is a corporation duly organized and existing under the laws of the State of Wisconsin, and having its principal place of business in the Eastern District of Wisconsin, and a citizen of the said State, and an inhabitant of the Eastern District of the said State; and that the amount in controversy in this Cause as hereinafter shown is of more than Three Thousand Dollars in value, exclusive of interest and costs.

Second. That on, to-wit, the 20th day of January, A. D. 1881, the Northern Pacific Railroad Company, a corporation, was the owner in fee and in possession of the following described tract of land to-wit: The North half of Section nineteen (19), Township twenty-five (25) North, Range forty-three (43) East of the Willamette Meridian lying and being in Spokane County in the then territory (now State) of Washington; that the said tract of land abutted on the south the town of Spokane Falls, then having a population of not to exceed three hundred people; that on

said date, the said Northern Pacific Railroad Company duly made and executed and filed and recorded in the office of the Auditor of Spokane County, in said Territory, a town plat of an addition to the said town of Spokane Falls, called Railroad Addition to Spokane Falls, which said addition was laid out upon and occupied the greater part of the tract of land above described, upon which said plat was shown lots and blocks and streets and alleys, with figures and explanatory notes showing the size of the said lots and blocks, and the width of the streets and alleys, and with the names of the several streets plainly indicated in writing thereon, and which said plat contained a writing, duly made and executed by and on behalf of said Northern Pacific Railroad Company, dedicating the streets and alleys shown on said plat to the use of the public. A copy of the said town plat is hereunto attached, and made a part of this bill of complaint, and marked "Plaintiff's Exhibit A."

Third: That in and upon said town plat, and extending from Washington street on the east to Adams street on the west, a Street two hundred twenty-five and seven tenths 225.7) feet wide, was marked and indicated and named and called "Railroad Street," which said Street was in and by the said plat and the dedicatory writing attached thereto, and was intended by the said Northern Pacific Railroad Company to be dedicated to the use of the public as a Street, with a reservation in the said Railroad Company of the right to use and employ the surface of the said Street for the railway tracks and other uses of the said Railroad Company, as indicated on said plat, which were

to-wit; a single line of track located in approximately the centre of said Railroad Street and extending throughout its entire length, with two switch tracks, one on each side of the main track, extending from Post Street on the east to Monroe Street on the west, and with a Depot building on the north side of the northerly switch track, and abutting thereon. And Plaintiff alleges that from the time of the filing of said town plat as aforesaid, Railroad Street became a public street and that it has ever since remained and now is a public street.

Fourth: That thereupon, and immediately thereafter, the said Northern Pacific Railroad Company put upon the market and proceeded to sell and dispose of to the public, for a consideration in money, the lots and blocks marked and described on the said town plat, and that prior to the year 1889 it had sold to individuals, and conveyed by deeds with the usual covenants of warranty, all or nearly all the lots and blocks shown on the said town plat as abutting on Railroad Street, describing the same in the said deeds by reference to the plat filed as aforesaid, and that on, to-wit: August 21, 1888, it sold to Plaintiff's grantor, and conveyed to him by deed with the usual covenants of warranty, Lot Four (4) in Block Twenty-nine (29) of said Railroad Addition, describing the same in the said deed solely by reference to the said town plat, and Plaintiff, by mesne conveyances from the grantee of the said Railroad Company, is now the owner in fee of said Lot Four (4), Block Twenty-nine (29) of said Railroad Addition; said lot abuts on Railroad Street and Plaintiff has erected a building on said

lot and abutting on said Railroad Street, at a cost to it of approximately Thirty-five Thousand Dollars, which said building is now standing intact and in use as a warehouse.

Fifth: That immediately after the filing and recording of the said town plat, Railroad Street was thrown open to public use as a street by the said Northern Pacific Railroad Company, and was used and employed as a street by the public, with the knowledge and consent of the said Railroad Company, for more than ten years, during which time it sold to individual members of the public the lots abutting on said Street, and during which time individuals and corporations owning lots abutting on said street, constructed residence and business buildings fronting on said street, which were served for purposes of ingress and egress and light and air, and all other street purposes, by said Railroad Street, all with the knowledge and consent and the procurement and acquiescence of the said Northern Pacific Railroad Company. In the year 1889 a great fire destroyed all the business part of the then town of Spokane Falls, including all buildings abutting on Railroad Street in the said Railroad Addition, and at the time of the said fire, Railroad Street was one of the principal streets of the said town, built up almost solidly with residences and business buildings, most of them fronting on said Railroad Street, and served by the said street. All of the said buildings then standing on the south side of Railroad Street, except buildings on corner lots, had no other means of access than by and through Railroad Street, and the plaintiff alleges that if for any reason the act of the said Railroad

Company in filing and recording the said town plat was ineffective to dedicate Railroad Street as a Street, under the laws of the Territory of Washington, relating to the making and recording of town plats, that the intention and purpose of said Railroad Company, as aforesaid, to open said Railroad Street as a Street following by the opening of the same, and acceptance and user of the same by the public as a Street as aforesaid, constituted a common law dedication of the said street to the use of the public.

Sixth: That the defendant, the Northern Pacific Railway Company, is now the owner and in possession of all the property and property rights, corporeal or incorporeal, of the said Northern Pacific Railroad Company, having succeeded to them in the year 1896 by purchase at a Judicial sale of the said property and property rights, and is engaged in operating the line of railway formerly owned and operated by the last named Company from Lake Superior to Puget Sound, which said line of railway passes through the City of Spokane, (formerly the town of Spokane Falls) on the surface of Railroad Street in the said City.

Seventh: That at the time of the dedication of Railroad Street, as Plaintiff is informed and believes, and on such information and belief alleges, it was not believed or intended by the said Northern Pacific Railroad Company that the said town would or should grow to any appreciable extent, and it was believed that the uses and purposes reserved to the said Railroad Company, and shown on the town plat of its addition to Spokane Falls, would at all times be sufficient for the purposes of its business, and Plaintiff alleges that

the uses and purposes so shown on the said town plat were the only uses and purposes intended to be reserved by it, and the only uses and purposes that were in fact and in law reserved by it in its plat dedicating to the public the streets and alleys of Railroad Addition to Spokane Falls. Since the filing and recording of said town plat, the name of the town of Spokane Falls has been changed to that of the City of Spokane, and the population of the City of Spokane has grown to approximately one hundred and twenty-five thousand people, and all or nearly all of the lots and blocks of Railroad Addition, including those abutting on Railroad Street, are in private ownership, and have been improved by the erection of business buildings costing in the aggregate many millions of dollars. From the year 1881 to the year of 1896 the said Railroad Street was used and employed by the said Northern Pacific Railroad Company for certain of its tracks laid upon the surface of the street, and for a small Depot building in the center of the street, but not otherwise, and since the year 1896 the said Street has been used and employed by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, for the use of its tracks upon the surface of said street, but not otherwise; and all lots and blocks in Railroad Addition, and the lots and blocks in said Railroad Street than that reserved in the dedication of Railroad Addition, and that to which it has been put for now more than thirty years, and particularly by any structure placed in the said Street which will close the same to the public or impair the full use of the same as a street by the

public and the abutting owners; yet notwithstanding that fact, and in violation of the rights of the owners of lots abutting on Railroad Street, the defendant, the Northern Pacific Railway Company has threatened to and is now about to proceed to build and erect in said Railroad Street, extending its entire length through Railroad Addition, a dirt fill or embankment, secured by retaining walls of concrete or stone masonry, approximately fifteen feet high, and occupying the said Street for a width of Eighty-five feet, for the purpose of carrying its tracks at an elevation instead of upon the surface of said street as at present, which said dirt fill or embankment will destroy Railroad Street, or seriously impair its use and enjoyment by the public, and by the abutting lot owners, for purposes of access and light and air and other beneficial use and enjoyment of their property, and in addition when the said structure is built and trains are operated on it, the trains will cast upon abutting properties, and upon other property in the vicinity, dirt, dust, cinders, smoke, deleterious gases, and other poisonous deleterious and offensive substances, and will cause great access of noise and of jarring from the operation of trains, to such an extent as to seriously interfere with the enjoyment of the real property in the vicinity, and to render the improvements on said property unfit for residence or business purposes, all to the greatly increased detriment of abutting owners, and to the diminution in value of the abutting properties. The said dirt fill or embankment in its passage by and in front of the real property of Plaintiff before described, will so occupy Railroad Street that there will

remain only ten feet between the Railroad Street front of Plaintiff's property and the south retaining wall of the said dirt fill or embankment, thus preventing access to the buildings on said property by and through Railroad Street and cutting off from and depriving said property of light and air by and through Railroad Street, and rendering the said property peculiarly and exceptionally liable to all the injurious results from the operation of trains over the said elevated structure hereinbefore alleged. The diminution in value to the abutting lots of Plaintiff and the building erected thereon, if the said elevated structure in Railroad Street be built, and maintained, will be more than Forty Thousand Dollars, and plaintiff will be damaged to that extent.

Eighth: That it is contemplated and intended by the defendant, as Plaintiff is informed and believes, and on such information and belief alleges, when the said elevated structure shall be built and tracks laid thereon, to receive and transport on the said tracks through the City of Spokane, the freight traffic, both of its own and of other transcontinental railroad lines, both east and west bound traffic, and that the said elevated structure is to be built for that purpose, and for none other; that the operation of heavy freight trains over the said structure will be so continuous or at such short intervals, and the said trains will cause such noise and produce such jarring and will cast such quantities of dirt, dust, cinders, smoke, and deleterious gases, that the same will impair the enjoyment and impair the value of all real property situated on or in the vicinity of said Railroad Street; that Railroad Street extends east and west through the heart of the busi-

ness center of the City of Spokane, and some of the most valuable business property in the said City with the most valuable improvements thereon, lies and abuts upon each side of said Railroad Street, and Plaintiff alleges that, situated, as it will be, and used for the purpose contemplated, the said elevated structure will be a nuisance per se and without reference to its situation and character as an unlawful obstruction of Railroad Street.

Ninth. That the defendant pretends to be acting under the duress and compulsion of a mandatory ordinance of the City of Spokane, requiring it to elevate its tracks on Railroad Street so that the same will pass over the cross streets at a sufficient height to permit traffic on the cross streets to pass thereunder without hindrance; that while it is true that the said ordinance professes to order and require the defendant to separate its grade from that of the street grades by elevating the plane of its tracks, the said ordinance contains the following controlling provision: "Section 23. The Railway Company shall accept the terms and conditions of this ordinance within forty-five days after its passage, by filing with the City Clerk of said City of Spokane a written acceptance of the same, and if not accepted within said time, said ordinance shall be null and void unless further time be expressly given by the City Council." Said ordinance was drafted and presented to the City Council by the defendant, and its passage was solicited by the defendant, which has solicited a similar ordinance from the City Council for many years, but had always been defeated in its efforts to have such an ordinance passed by the protest

of the citizens and property owners of the City of Spokane. The purpose of the defendant in seeking the passage of said ordinance was to improve the grade of its railway through the City of Spokane, so that it might with greater ease and less cost, haul its own east and west bound freight traffic and that of other transcontinental railroads through the City of Spokane, and no consideration of the public health or safety actuated it in seeking the passage of the ordinance, nor, as Plaintiff verily believes, actuated the Council of the City of Spokane in the passage of the said ordinance; and Plaintiff alleges that the passage of the said ordinance in the guise of a mandatory ordinance, when it was in truth merely a permissive ordinance, was a lawless and arbitrary exercise of power on the part of the City Council, instigated by the defendant, for the purpose of destroying or curtailing the rights of owners of property abutting on Railroad Street, or failing that, in securing adequate damages for injuries inflicted on their property by the building of said structure.

Plaintiff alleges that the said ordinance is absolutely void because the subject matter of the same is, by the laws of the State of Washington, committed to the exclusive jurisdiction of another and different agency of the State, to-wit, the Public Service Commission of the State, and because the said ordinance undertakes to authorize, without authority in the City Council to so authorize, an obstruction of one of the public streets of the City of Spokane, and that it is also void as an attempt on the part of the Council of the City of Spokane to authorize the maintenance and

operation of the defendant's railroad through the City of Spokane in a manner that will constitute the same a public nuisance irrespective of its effect as an obstruction of Railroad Street, and Plaintiff alleges further that if the said ordinance be valid, it confers no authority on the said defendant to obstruct Railroad Street in the manner aforesaid and for the purpose aforesaid, without first having had ascertained and determined in the manner provided by law, the extent of the loss and injury inflicted on real property abutting on said Railroad Street by the structure aforesaid, and without first paying to the owners of such abutting property, the loss and injury so found and ascertained. But the said defendant pretends that the ordinance of the City of Spokane before referred to, authorizes it to erect and maintain the said structure and to operate its line of railway thereon, without regard to the injurious effects of the same on the abutting owners, and without making to them compensation for the injurious effects thereof upon their abutting property, and it denies that they are entitled to compensation in the premises, and the said defendant will, pursuant to the pretended authority of the ordinance aforesaid, proceed to erect and build the said structure and to maintain the same, and to operate its freight and passenger trains over the same, unless restrained by the injunction of this Honorable Court.

Tenth: All of which doings, actings, and pretenses of the said defendant, are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of the Plaintiff in the premises. In consideration whereof, and forasmuch as the Plaintiff

is remediless in the premises, at and by the strict rules of the common law, and can only have relief in a Court of equity, where matters of this nature are properly cognizable and relievable, Plaintiff prays:

First: That a writ of subpoena issue against the defendant, the Northern Pacific Railway Company, requiring it to appear in this Court and answer this bill of complaint, but without oath, all answers under oath being hereby expressly waived, and to stand and abide such orders and decrees as the Court may from time to time make, adjudge and enter in the premises.

Second: That pending the final determination of the subject-matter hereof, a preliminary injunction issue restraining the said defendant from constructing, building or maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that on final hearing the Court render a decree perpetually enjoining and restraining the defendant from constructing, building and maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that if, pending the final hearing, the defendant shall have constructed and built such structure in Railroad Street, in whole or in part, that the Court, as part of its final decree, issue a mandatory injunction requiring and compelling the defendant to remove the said structure from Railroad Street and to restore the said Street to the condition in which it was before the building and erection of said structure.

Third: That if for any cause the Court shall consider that the defendant is entitled to build and erect said structure in Railroad Street, that this cause be re-

tained and that the Court issue a perpetual injunction enjoining and restraining the defendant from building, erecting and maintaining the said structure, as alleged in the complaint, until it shall have caused to be ascertained and paid, in the manner provided by the constitution and laws of the State of Washington, compensation for the property of the Plaintiff taken and damaged by the building, erection and maintenance of said structure as aforesaid.

Fourth: And for such other and further relief as to the Court shall seem meet and equitable.

(Signed) TURNER & GERAGHTY,

(Signed) POST, AVERY & HIGGINS,

Attorneys for Plaintiff.

State of Washington,

County of Spokane,—ss.

Before me, the undersigned Notary Public, in and for the State and County aforesaid, personally appeared H. A. Holland, the president of the H. A. & L. D. Holland Company, a corporation, the above named plaintiff, who, on being duly sworn deposes and says that he is the president of the H. A. & L. D. Holland Company, a corporation, and makes this verification on its behalf. That he has read the foregoing bill of complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to matters stated on knowledge and belief, and as to those matters, he believes it to be true.

(Signed) H. A. HOLLAND.

Subscribed and sworn to before me this 6th day of January, 1913.

(Seal)

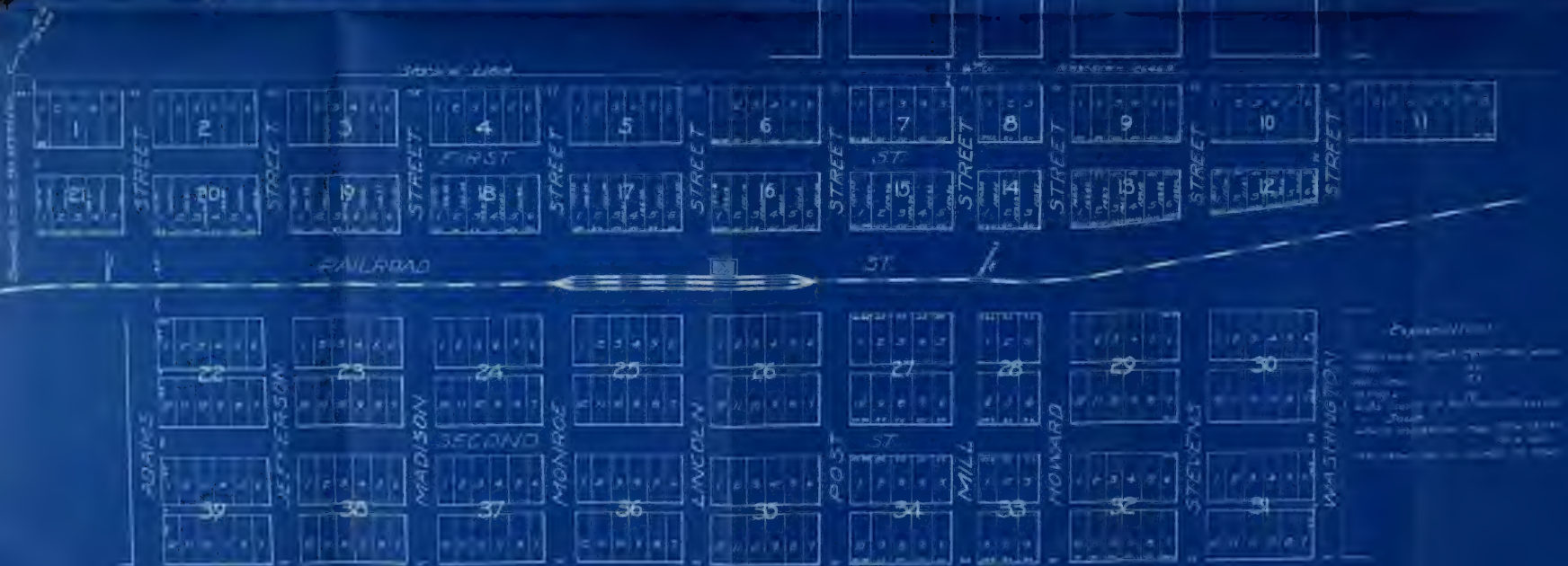
J. M. GERAGHTY,
Notary Public.

TOWN PLAT

- OF -

RAILROAD ADDITION

Spokane Falls.



Endorsement: Bill of Complaint of H. A. & L. D.
HOLLAND COMPANY.

Filed January 7, 1913.

W. H. HARE, Clerk.
By F. C. Nash, Deputy.

*In the District Court of the United States, in and for
the Eastern District of Washington, Northern
Division.*

H. A. & L. D. HOLLAND COMPANY, a corpor-
ation, *Plaintiff.*

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY. *Defendant.*

IN EQUITY.

The answer of The Northern Pacific Railway Com-
pany, defendant, to the complaint of H. A. & L.
D. Holland Company:

This defendant answers and says:

1. Admits that plaintiff is a corporation organized and existing under the laws of the State of Washington, having its principal place of business in the Eastern District of Washington, and that the defendant is a corporation organized and existing under the laws of the State of Wisconsin, and a citizen and resident of such state; admits that the amount in controversy in this cause is more than three thousand dollars in value, exclusive of interest and costs.

2. Admits that on to-wit; January 20, 1881, the Northern Pacific Railroad Company owned in fee the north one-half (N 1-2) of Section nineteen (19),

Township Twenty-five (25), North, Range Forty-three (43), E. W. M., in Spokane County; admits that said tract of land abutted on the South the town of Spokane Falls, which then had a population of not to exceed three hundred people; admits that on, to-wit; January 20, 1881, said Northern Pacific Railroad Company made, executed, and filed in the office of the County Auditor of Spokane County, a town plat of an addition to said town of Spokane Falls called "Railroad Addition to Spokane Falls," and that said addition was laid out upon and occupied a portion of the tract of land heretofore described; admits that upon such plat was shown lots, blocks, streets, and alleys and the names of the streets and the width of the streets and alleys; and admits that the paper attached to the bill of complaint, marked "Exhibit A" is substantially a correct copy of such plat. Further answering in respect to said town plat, defendant says that the dedicatory writing on the paper whereon said plat is delineated, signed by John W. Sprague, and to which is attached a certificate of his acknowledgement thereto before one E. E. Cooper, a Notary Public, under date of December 8, 1880, contained an exception from the dedication of the marked streets on said plat of that strip of land 225.7 feet in width, designated as Railroad Street, and that such exception from the dedication is to be read in connection with the dedication and in connection with and as a part of the whole plat, and each and every part thereof.

Further answering the averments of the bill in respect of the ownership of the real estate occupied by said town plat, defendant says:

The Northern Pacific Railroad Company acquired title to a strip four hundred feet in width across said land, to-wit; two hundred feet in width on each side of the center of its main track as marked and shown on said town plat under the designation of "Railroad Street" for the right of way for its railroad, which said right of way was granted to it by the second section of the Act of Congress approved July 2, 1864, incorporating such company; and that it acquired title to the remainder of said land by section three of said act.

3. Defendant denies that upon said plat a street was marked or indicated as is averred in the third paragraph of the bill of complaint, but says that the strip of land referred to therein and marked "Railroad Street" on said plat was and is by said plat and the dedicatory and explanatory writing thereon and a part thereof, excepted from dedication as a street, either in whole or in part; denies that the Northern Pacific Railroad Company in and by said plat or the dedicatory writing attached thereto, or at all, intended to dedicate said strip of land to the use of the public as a street, or at all, or with or without the reservations stated in said bill, and particularly referred to in the fourth paragraph thereof, and denies that from the time of filing said plat, or at all, said strip of land became a public street, and denies that it now is a public street.

Further answering as to the alleged dedication of the strip referred to as Railroad Street, defendant says that the Northern Pacific Railroad Company was wholly without power to dedicate said strip of land, or

any part thereof, as a street, either with or without reservation, or in any other manner to convey or part with title to or easement in the said strip of land granted to it for a right of way, as above alleged. Therefore defendant says if said plat and the writing thereon, or any other matter or thing alleged in the bill of complaint, might or could be considered as a dedication to the public use of the strip of land designated as Railroad Street to the extent alleged in the bill of complaint, or at all, the same was and is wholly void and of no effect whatsoever.

4. Defendant admits that after the filing of said plat the Northern Pacific Railroad Company did put upon the market and sell and dispose of the lots and blocks marked on said plat, and that prior to the year 1889, it had sold and disposed of and conveyed, with the usual covenants of warranty, portions of the lots and blocks shown on the said plat as abutting upon the strip of land designated as Railroad Street, and that in a portion of said deeds it did describe the property conveyed by reference to the said plat; admits that on or about December 14, 1889, it conveyed lots five (5) and six (6) in block twenty-nine (29) of the said Railroad Addition, conveying the same in said deed by reference to the town plat, but defendant states that it has no knowledge as to whether plaintiffs are the owners of said premises in fee, or otherwise, by mesne conveyance from the grantee of said Railroad Company, and that it has no knowledge as to the location of buildings upon such lots, the cost thereof, or their present condition and use.

5. Defendant denies that after the filing of said

plat, or at all, the strip of land referred to as Railroad Street was thrown open to the public use as a street by the Northern Pacific Railroad Company, and denies that it was used as a street by the public with the knowledge and consent of the Railroad Company, or at all; denies that individuals and corporations used said street for the purpose of ingress and egress, and for light and air, and for other purposes, with the knowledge and consent of the Railroad Company, or at all; admits the destruction of the business portion of Spokane Falls by fire in 1889, including the buildings near to or abutting upon the strip of land referred to as Railroad Street, but denies that such strip of land was one of the principal streets of the town at that time, or at all, and denies that any building standing or abutting upon such strip of land had no other means of access, and denies that the intention and purpose of said railroad company was to open said strip of land as a street; and denies that the same was accepted by the public as a street, as alleged in the bill of complaint, or at all; and denies that the acts and things mentioned in said bill, and particularly in the fifth paragraph thereof constituted a common law dedication of said street to the use of the public. And further answering the averments of the bill in respect to the use of said strip of land by the public, the defendant says that such use as the public made thereof was permissive only and for the purposes of the Railroad Company in affording conveniences to the public having occasion to do business with it.

6. Defendant admits that it is now the owner and in possession of all the property and property rights

of the Northern Pacific Railroad Company, and that it succeeded to the same in the year 1896, by purchase at judicial sale, and that it is engaged in operating the line of railroad formerly owned and operated by the said Railroad Company from Lake Superior to Puget Sound, and admits that its line of railway passes through the City of Spokane on the surface of the strip of ground referred to as "Railroad Street."

7. Defendant states that it has no knowledge or information as to whether or not the Northern Pacific Railroad Company, at the time of the filing of the said plat, believed that the town of Spokane Falls would not grow to any appreciable extent. But it denies that there was in law any reservation to the Railroad Company of any uses or purposes in the strip of land marked as "Railroad Street," but avers that in law and in fact the said strip of land was entirely excluded, both by operation of the law through the words of exception used, and in the intention of the Railroad Company, from dedication as a public street on said plat. Defendant admits that since the filing and recording of the plat the name of the Town of Spokane Falls has been changed to the City of Spokane, and that the population has grown to approximately 125,000 people; admits that a portion of the lots and blocks in Railroad Addition abutting upon the strip of land marked upon said plat as Railroad Street are in private ownership, and that some of them have been improved by the erection of business buildings; admits that between the years 1881 and 1896 its said right of way on the strip referred to as Railroad Street was used and employed by the said Railroad Company

for tracks laid upon the surface thereof, and for a depot building located thereon, but alleges that said strip of land was likewise used for all the needed railroad purposes of said company without let or hindrance from any one, and solely because such strip of land was regarded by the Railroad Company and by all other corporations and persons as its private property, title to which in fee was owned by it; admits that since the year 1896, the said strip of land has been used and employed by this defendant for the use of its tracks upon the surface of said strip of land, but denies that said strip of land has not been otherwise used by it, but says, on the contrary, that it has at all times used and employed said strip of land, and so much thereof as it desired, for its own private uses and purposes, to the exclusion of every other person or corporation, save such as it may have permitted to use the strip of land for its convenience in the transaction of its business; denies that the lots and blocks in Railroad Addition in general and the lots and blocks in said addition abutting upon said strip of land in particular, would be seriously injured and damaged, or at all, by the use of said strip of land for further additional railroad purposes, and for the construction of the elevated tracks thereon, as proposed by the defendant under the ordinance referred to in the bill of complaint, but says, on the contrary, that all such lots and blocks would be benefited by such change of grade and the operation of defendant's tracks over said strip of land on an elevated grade; admits that it is about to proceed to build and erect on the strip of land referred to as Railroad Street a

dirt fill, secured by retaining walls of concrete and stone masonry, approximately fifteen feet high, and occupying the strip for a width of about eighty-five feet, for the purpose of carrying its tracks at an elevation instead of upon the surface of the strip as at present; but denies that said dirt fill will destroy such strip of land, or in any way impair its use and enjoyment by the public, or by the abutting lot owners for any purpose to which either the public or such abutting lot owners have any right to use it; denies that it will interfere with access of light or air, or any other beneficial use and enjoyment of their property by any abutting lot owners or any other person; denies that the trains which will be operated over the fill when completed will cast upon abutting properties, or upon other property in the vicinity, any dust, dirt, cinders, smoke, deleterious gases, or other poisonous, deleterious or offensive substances in any other manner, or to any greater or different extent than is now caused by the operation of railroad trains along and upon such strip of land; denies that the operation of railroad trains over such fill will cause great or any increase of noise and of jarring from the operation of trains, or that it will at all interfere with the enjoyment of real property in the vicinity, or render the improvements on such property unfit for residence or business purposes, and denies that any such use of the strip will be to the detriment in any particular of the abutting owners, or operate to diminish in value abutting properties; admits that such fill will so occupy said strip that only about ten feet will intervene between that part of plaintiff's property which abuts upon the strip of land

referred to as Railroad Street and the south retaining wall of such fill, but denies that access to the buildings on such property by and through such strip of land will be prevented; and denies that the erection of the fill will cut off or deprive such property of light or air by and through such strip of land, and denies that such property is peculiarly or exceptionally liable to any injurious results from the operation of trains over such fill; and denies that such property, or the buildings located thereon, will be diminished in value in the sum of \$40,000, or at all, by the construction of the fill on said strip of land, as alleged, and denies that plaintiff will be damaged by the construction of such fill in the sum of \$40,000, or in any other sum whatsoever.

8. Defendant admits that when the fill shall have been constructed upon such strip of land as aforesaid and tracks shall have been laid thereon, that it will receive and transport on such tracks through the City of Spokane the freight traffic of its own and other transcontinental railroad lines, both east and west bound and avers that such tracks are intended for the transporting of both freight and passenger business; it denies that the operation of trains over such structure will be continuous, or at short intervals, and denies that such trains operating thereover will cause noise, produce jarring, and cast quantities of dirt, dust, cinders, smoke, and deleterious gases that will impair the enjoyment and the value of all real property situated on or in the vicinity of the strip of land referred to as Railroad Street; admits that the strip of land referred to as Railroad Street extends east and west through

the heart of the business center of the City of Spokane, and that some of the most valuable business property in the city, with valuable improvements thereon, lies and abuts upon each side of such street, but denies that the fill to be erected thereon and used as it is intended to be used will be a nuisance per se, or at all, or an unlawful or any other obstruction of such strip of land.

9. Defendant admits that it is acting in part under the duress and compulsion of an ordinance of the City of Spokane requiring it to elevate its tracks through the city so that traffic upon the city streets shall pass over its right of way and tracks otherwise than at grade, but alleges that in the elevation of its tracks and the change of grade of the strip of land referred to as Railroad Street, it acted also in the exercise of its inherent right and power to make such changes thereon as might be necessary for the proper operation of its railroad system, and that under and by virtue of the grant of Congress to its predecessor in interest, the Northern Pacific Railroad Company, of the right of way in which is included the strip of land referred to herein as Railroad Street, it had the power, and it was its duty, at any time to make such changes in the grade thereof as should be required in the proper operation of its railroad line, and it avers that the change of grade which it proposes to make is required for the proper operation of its railroad lines, and that it is essential to the discharge of its duties to the public that such changes be made, and no act of the Northern Pacific Railroad Company, or this defendant, could or did disable it from exercising its power to make such

changes in the grade of its line as should be necessary in the operation of its railroad system. Defendant admits that the ordinance of the City of Spokane referred to contained the section that is quoted in the ninth paragraph of the complaint; admits that an ordinance was drafted by defendant and presented to the city council, and its passage was solicited by defendant; admits that it has for some time sought the passage of an ordinance relating to the abolition of grade crossings, but denies that the ordinance which was adopted was drafted or presented to the city council by defendant, or that its passage was solicited by defendant, or that it has solicited a similar ordinance from the city council for many years, or at all, and that it has been defeated in its efforts to have such an ordinance passed by the protests of property owners of the City of Spokane. Defendant denies that in endeavoring to secure the abolition of grade crossings, its purpose was to improve the grade of its railway through the City of Spokane; denies that no consideration of the public health or safety actuated it in seeking the passage of an ordinance having that purpose; denies that no consideration of the public health or safety actuated the city council in the passage of the ordinance in question; denies that the enactment of the ordinance was a lawless and arbitrary exercise of power on the part of the city council; denies that it was instigated by defendant; denies that such ordinance was other than it appears to be upon its face; denies that its adoption was for the purpose of destroying or curtailing the rights of abutting property owners to oppose the building of the proposed fill upon the

strip of land marked Railroad Street, and denies that it was for the purpose of preventing such property owners from securing adequate damages for injuries inflicted to their property by the building of the structure; defendant also denies that the ordinance is void because the subject matter of the same is by the laws of the state committed to the jurisdiction of the Public Service Commission of the state, but avers that if it be the law that the Public Service Commission of Washington is, under the statutes of that state, alone empowered to compel the separation of grade crossings, that fact is utterly immaterial in the case in hand. The City of Spokane has by the ordinance in question provided for the change of the grade of its streets, a matter of which it has exclusive jurisdiction, and as a part of the plan for the change of such streets, as proposed by such ordinance, it is assential that the defendant change the grade of its right of way and tracks as proposed in such ordinance. The defendant is not opposing such change, but has consented thereto, and even if it be that the Public Service Commission alone has power to compel a change of grade over the protest of a Railroad Company, there is nothing in that rule which forbids a city to change the grade of its streets and a railroad company, such as defendant, to make such changes in the grade of its tracks as will permit the city's plans for grade change to be effectual. Defendant denies that the ordinance in question is void because it undertakes to authorize an obstruction of one of the public streets of the City of Spokane; denies that it is void because it is an attempt to authorize the maintenance and operation of the defendant's railroad

through the city in such a manner as will constitute a public nuisance. Defendant denies that such ordinance confers no authority on defendant to make the change in the grade of the strip referred to as Railroad Street without first having had ascertained and determined the amount of loss and injury inflicted on real property abutting upon such strip by the change therein, and without first paying to the owners of such abutting property the loss and injury so caused. Defendant admits that it claims that the ordinance in question authorizes it to erect and maintain the fill along such strip as proposed, and to operate its line of railway thereon without regard to the injurious effects, if any there are, resulting to the abutting owners, and without making to them compensation for the injurious effects, if any there are, upon their property; admits that it denies that the property owners along said strip of land are entitled to compensation because of the change in grade thereon, and admits that it will, pursuant to the authority of the ordinance aforesaid, and in the exercise of its inherent power to make such changes in its own property as shall be necessary for the proper operation of its railroad lines, proceed to construct the fill contemplated by the ordinance along the strip of land aforesaid, and will maintain the same thereon, and will operate its freight and passenger trains over the same, unless restrained by the injunction of this court.

Further answering with respect to the ordinance referred to in the bill of complaint and particularly with respect to the matters and things set forth in the ninth paragraph of such complaint, defendant alleges that its railroad lines, over which are operated numerous trans-

continental trains for the carriage of passengers and freight, extend at grade across the whole of the City of Spokane, being a distance of four or five miles, and that many of the streets of the City of Spokane cross its tracks at grade. Where its right of way and tracks run through Railroad Addition over the strip of land referred to as Railroad Street, it is operating in the heart of the business section of Spokane; wholesale houses in all lines of business have been located along its tracks and abutting thereupon are large warehouses where goods are received from and shipped out over its lines of railway. These warehouses are for the principal part constructed upon the strip of land referred to as Railroad Street by virtue of permission so to do granted by defendant. In addition to its through freight and passenger trains and many local freight and passenger trains which pass over its tracks through such railroad addition over the strip of land referred to as Railroad Street, the defendant operates thereover many switching trains engaged in the handling of goods from and to the warehouses aforesaid, and the same thing is true along its right of way on both sides of the said Railroad Addition for a distance of a mile or more. The principal part of the business section of the City of Spokane lies to the north of defendant's right of way where it runs through the city, but a considerable business section lies to the south of its tracks, and more than one-half of the residence section of the city lies to the south of its tracks. In consequence of the location of its right of way through the heart of the city almost equally dividing the population thereof, the traffic across its right of way over the public streets

of the city has become very heavy and is growing greater each year. Street railway lines are laid upon many of the city's streets crossing the defendant's right of way, and street cars are continually passing there-over. So great has the volume of business become that there is ever and imminent danger arising from the crossing of defendant's tracks at grade, not only to those who cross its tracks by a street car or other vehicle, or on foot, but to the passengers upon defendant's trains, and the operation of defendant's railroad system through the City of Spokane has been much hindered and impeded, and has been rendered much less efficient than it would be if there were a separation of grades, and in a few years, with the increasing growth of the city, it will become almost impossible to efficiently operate its lines through Spokane. The danger and inconvenience, both to the public and to the defendant, arising from the crossing of defendant's tracks by streets at grade, has long been recognized by the people of the City of Spokane, by the city officials, and by the defendant, and it has been the desire of all that such changes might be made in the grades of the city's streets and of the defendant's right of way as should do away with grade crossings. After several years of study, negotiations, and consultation, a plan was arrived at for making changes in the grades of the city's streets and of defendant's right of way, so that a separation of grade between the right of way and the streets should be accomplished, and to carry out such plan the city council of the City of Spokane, on or about February 16, 1912, duly passed and adopted Ordinance No. C594, a copy of which is at-

tached hereto, marked Exhibit A and is prayed to be read as a part of this answer, such ordinance being the same ordinance which is referred to in the plaintiff's bill of complaint. The plan of grade separation proposed was agreed to by defendant, and it accepted the terms and conditions of the ordinance in writing, as required by the provisions thereof, and defendant ever since has been and is now willing to comply with such ordinance, and to execute the same in all respects, and even though it had not been so willing to comply with its conditions, the ordinance is mandatory in terms and in character, and the City of Spokane could have compelled defendant to comply therewith.

Still further answering with respect to such ordinance, defendant alleges that therein and thereby the City of Spokane undertook to and did provide for the change of the grade of its streets which have heretofore crossed defendant's right of way and tracks at grade, and that under and by virtue of the laws of the State of Washington the City of Spokane was authorized and empowered in its discretion to make such changes in the grade of its streets. Under and by virtue of such ordinance, the City of Spokane is now proceeding to provide for changes in the grade of its streets where they cross the defendant's right of way and tracks, and is proceeding and will proceed to take all steps which are necessary to make the changes in the grade of its streets contemplated by the ordinance in question. If defendant should in this cause be enjoined from making the change in the grade of its right of way and tracks as provided in such ordinance and as it proposes to do in compliance therewith, the

City of Spokane will be prevented from making the change in the grade of its streets which is contemplated by such ordinance, and which it is proceeding to make, for the proposed changes in its streets cannot be made unless, as a part of the plan thereof, the change of grade of defendant's right of way is made as required by such ordinance. To enjoin defendant, therefore, from changing the grade of its right of way and tracks is, in effect, to enjoin the City of Spokane from making the contemplated changes in the grade of its streets and to enjoin the enforcement of a city ordinance, and the defendant says that therefore the City of Spokane is a necessary party to this suit to answer with respect to the validity of an ordinance duly adopted by its city council and to defend against any decree the effect of which will be to prevent it from carrying out its schemes of municipal improvement.

10. Defendant denies that anything done or claimed by it with respect to the change of grade in question is contrary to equity or good conscience, and tends to the wrong, injury, or oppression of the plaintiff, and denies that plaintiff is remediless in the premises at common law, and can only have relief in a court of equity. It avers, on the contrary, that if it is mistaken with respect to any matter or thing done, or claimed by it hereunder, and plaintiff is entitled to compensation by way of damages, or otherwise, by reason of the construction of the fill proposed and the operation of the trains thereover, that then the matter of the compensation to be paid is cognizable by courts of law in proper proceedings brought therefor,

and that the same is not subject to the jurisdiction of a court of equity.

All of which matters and things this defendant stands ready to aver and prove as this court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf sustained.

(Signed) CHARLES W. BUNN.

(Signed) EDWARD J. CANNON.

(Signed) GRAVES, KIZER & GRAVES.

Solicitors for Defendant.

EXHIBIT "A"

ORDINANCE NO. C594.

An ordinance requiring the Northern Pacific Railway Company to separate its grade from that of the street grades within a portion of the City of Spokane by elevating the plane of its tracks and by changing the grade of certain of the streets, and affecting certain streets, avenues and alleys of said city.

The City of Spokane does ordain:

Section 1. The Northern Pacific Railway Company is ordered and required to separate its grade from that of the street grades by elevating the plane of its tracks and by changing the grade of certain of the streets, within the portion of the City of Spokane hereinafter set forth, in the manner and upon the conditions hereinafter specified.

Section 2. The district within which said railway company shall effect the separation of its grade from the street grade shall extend from and including Sprague avenue and Division street on the east to and including Sixth avenue on the west and all streets and

avenues excepting those to be vacated as hereinafter provided within the limits of said district, shall be crossed at an elevation and in the manner herein provided.

Section 3. As soon as the railway company has completed the separation of grades as herein provided, it shall remove all of its tracks from the present surface of the streets within the district described in Section 2 of this ordinance, and shall not thereafter lay down any tracks across streets at grade within such district, but the railway company may at any time construct, maintain and operate additional tracks across streets within said district in accordance with the specifications in this ordinance contained.

Section 4. Said separation, except at street crossings, and as otherwise in this section provided, shall be accomplished by an embankment of earth or other suitable filling material and in the district extending from Sprague avenue and Division street on the east to Walnut street on the west, said embankment shall be retained by walls of concrete or stone masonry carried up to the subgrade of the roadbed. From the point where the walls terminate at or near Walnut street westerly to Sixth avenue, a substantial iron fence of design satisfactory to the city council, with concrete or masonry posts shall be constructed between the streets and connected at each with the bridge abutments; provided that between Brown street and Washington street such separation may be accomplished by structures of concrete, steel or iron, or a combination of these materials. Such materials may also be used at other places between streets according to plans and

specifications to be submitted to and approved by the city council.

Section 5. Said elevated tracks shall be carried across the streets and avenues specified herein upon bridges constructed of iron, steel or concrete, or a combination of these materials, supported at the end upon abutments of concrete or stone masonry, so located that the exposed face of the said abutments shall be parallel to and coincident with or entirely outside the outside limits of the streets or avenues, and supported intermediately by three rows of columns, one of which shall be placed parallel to and within the established curb on each side of the streets, the remaining row shall be so placed that the center of same coincides with the center of the street; the minimum spacing of the columns parallel with the street shall be 13 feet between centers. Said bridges shall have substantial ballasted floors and shall be so constructed and maintained as to prevent water, dirt, oil or other substances from dropping from the elevated structure into the street. Walls and posts of said bridges shall be calcimined, painted or otherwise kept in a sightly and cleanly condition upon order of the city council. The bridge across Washington street shall be supported intermediately by one row of columns so placed that the center of the same coincides with the center of the street. Said bridges shall conform generally in their essential features to the plan attached and made a part of this ordinance and marked "Northern Pacific Railway Company, Spokane Grade Separation, typical plan for 75-foot street crossing at right angles to tracks."

Section 6. The elevated street crossings herein referred to shall be constructed in accordance with the following conditions and specifications, and the word "grade," as used in said specifications shall be understood to mean in all cases the elevations and rate of grade of the center lines of the streets. These grades and elevations may be varied at the discretion of the commissioner of public works, to the extent necessary, to give proper drainage to all points of the streets affected, to give proper crowning of the roadways and to provide for vertical curves where the algebraic sum of the rates of grades equals or exceeds 3 per cent.

SPRAGUE AVENUE AND DIVISION STREET.

	Sprague Avenue	Division Street
Width, face to face of abutment	75 feet	75 feet
Width of roadway	51 feet	51 feet
Width of sidewalks	12 feet	12 feet
Minimum vertical clearance	14 ft 6 in.	12 feet

The existing surfaces of Sprague avenue and Division street shall not be depressed below elevation 1921.7 city datum.

From the aforesaid elevation, easterly to an intersection with the present surface of the street, at or near the east side of Hilliard street, the grade of Sprague avenue shall not exceed 3.6 feet in 100 feet. From the aforesaid elevation westerly to an intersection with the present surface of the street at or near Browne street, the grade of Sprague avenue shall not exceed four (4) tenths foot in 100 feet.

From the aforesaid elevation northerly to an intersection with the present surface of the street at a point

near the south side of Riverside avenue, the grade of Division street shall not exceed 1.62 feet in 100 feet.

From the aforesaid elevation southerly to a point approximately 75 feet south of the south line of Sprague avenue, the grade of Division street shall not exceed 3.57 feet in 100 feet, and from the last described point to an intersection with the present surface of the street, at a point near the south line of First avenue, the grade of Division street shall not exceed three and four-tenths (3.4) feet in 100 feet.

From Division street to the west side of Pine street the grade of First avenue shall not exceed 2.21 feet in 100 feet; across Pine street the grade shall be level, and from the east side of Pine street to an intersection with the present surface of the street at or near the west side of Hilliard street, the grade of First avenue shall not exceed 5.27 feet in 100 feet.

From Sprague avenue to the northerly curb line of First avenue the grade of Pine street shall not exceed 4.7 feet in 100 feet; between curb lines of First avenue the grade of Pine street shall not exceed 1.82 feet in 100 feet, and from the southerly curb line of First avenue to the northerly line of Pacific avenue, the grade of Pine street shall not exceed 5.71 feet in 100 feet. From the northerly line of Pacific avenue to an intersection with the present surface of the street at or near the south line of Pacific avenue, the grade of Pine street shall not exceed 0.66 feet in 100 feet.

The railway company shall grade at a gradient not exceeding 12 feet in 100 feet east and west from Pine street approaches in the alleys in blocks seven (7) and eight (8) of Saunders' addition to Spokane, and when-

ever these alleys or either of them are graded or improved any additional cost in the work incurred by reason of the changes in grades of Division and Pine streets, as in this ordinance provided, shall be borne by the railway company.

BROWNE STREET.

Width, face to face abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Browne street shall not be depressed below elevation 19123.3 city datum.

From the aforesaid elevation northerly to an intersection with the present surface of the street at or near the south line of Sprague avenue, the grade of Browne street shall not exceed 1.5 feet in 100 feet.

From the aforesaid elevation southerly to an intersection with the present surface of the street at or near the northerly line of Pacific avenue, the grade of Browne street shall not exceed 4.6 feet in 100 feet.

The railway company shall grade at a gradient not exceeding 12 feet in 100 feet, east from Browne street, an approach in the alley in block 2, First addition to Fourth addition to Railroad addition to Spokane, and whenever this alley is graded or improved, and additional cost in the work incurred by reason of the change in grades of Browne street as in this ordinance provided, shall be borne by the railway company.

WASHINGTON STREET.

Width, face to face abutments-----	74 feet
Width of roadway-----	51 feet

Width of sidewalks-----11 feet 6 in.

Minimum vertical clearance-----18.2 feet

The grade of Washington street shall remain as it now exists.

STEVENS STREET.

Width, face to face abutments-----75 feet

Width of roadway-----51 feet

Width of sidewalks-----12 feet

Minimum vertical clearance-----12 feet

The grade of Stevens street shall not be depressed below elevation 1918.0 city datum.

The grade of Stevens street shall continue northerly on this elevation to an intersection with the present gradient of Stevens street from First avenue to a point 124.9 feet south of the south line of First avenue extended southerly.

From the aforesaid elevation southerly to an intersection with the present surface of the street, approximately 240 feet north of the northerly line of Second avenue, the grade of Stevens street shall not exceed 3 feet in 100 feet.

HOWARD STREET.

Width, fact to face of abutments-----75 feet

Width of roadway-----51 feet

Width of sidewalks-----12 feet

Minimum vertical clearance-----14 feet 6 in.

The grade of Howard street shall not be depressed below elevation 1914.7 city datum.

The grade of Howard street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 155 feet south of the south line of First avenue.

From the aforesaid elevation southerly to an intersection with the present surface of the street at or near the north line of the alley in Blocks 28 and 29, Railroad addition to Spokane, the grade of Howard street shall not exceed 2.4 feet in 100 feet.

WALL STREET.

Width, face to face of abutments.....	66 feet
Width of roadway.....	42 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Wall street shall not be depressed below elevation 1916.8 city datum.

The grade of Wall street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 225 feet south of the southerly line of First avenue.

From the aforesaid elevation southerly to an intersection with the present surface of the street at a point approximately 270 feet north of the northerly line of Second avenue, the grade of Wall street shall not exceed 3 feet in 100 feet.

POST STREET.

Width, face to face of abutments.....	66 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Post street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 155.06 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Sec-

ond avenue. The rate of grade between the aforesaid points shall not exceed 2.4 feet in 100 feet.

LINCOLN STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Lincoln street shall remain as it now exists, unless the city shall decide to change the grade of same from the south line of First avenue to a point 155.22 feet southerly from the south line of First avenue, before it is necessary for the Northern Pacific to pave that portion of Lincoln street lying between their present right of way limits, in which case the Northern Pacific shall regrade, repave, recurb and re-sidewalk and otherwise improve said Lincoln street corresponding to the improvements on either side of their right of way from a point 155.22 feet south of the south line of First avenue to a point 300 feet north of the north line of Second avenue, at such grades as the city shall by ordinance establish therefor.

MONROE STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	13 feet 6 in.

The grade of Monroe street shall be depressed to such an extent that a uniform grade will extend from the present grade of the ground at a point 155.44 feet south from the south line of First avenue to an intersection with the present surface of the ground at or

near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 3.3 feet in 100 feet.

MADISON STREET.

Width, face to face of abutments.....	75 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Madison street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 155.63 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 3.2 feet in 100 feet.

JEFFERSON STREET.

Width, face to face of abutments.....	75 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Jefferson street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 156 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid limits shall not exceed 3.3 feet in 100 feet.

ADAMS STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Adams street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 156 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid limits shall not exceed 2.4 feet in 100 feet.

CEDAR STREET.

Width, face to face of abutments-----	100 feet
Width of roadway-----	68 feet
Width of sidewalks-----	16 feet
Minimum vertical clearance-----	12 feet

The grade of Cedar street shall remain as it now exists.

WALNUT STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	14 feet 6 in.

The grade of Walnut street shall not be depressed below elevation 1910.4 city datum.

The grade of Walnut street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 10 feet south of the northerly line of Pacific avenue produced.

The grade of Walnut street from the aforesaid eleva-

tion southerly to an intersection with the present surface of the street at a point approximately 90 feet north of the northerly line of Second avenue, shall not exceed 3 feet in 100 feet.

From Walnut street to a point 100 feet west of the west line of Walnut street, the grade of Pacific avenue shall not exceed 2 feet in 100 feet.

MAPLE STREET AND SECOND AVENUE.

	Maple Street	Second Avenue
Width between outside supports of bridge -----	75 feet	75 feet
Width of roadway-----	51 feet	51 feet
Width of sidewalks-----	12 feet	12 feet
Minimum vertical clearance-----	14 ft. 6 in.	12 feet

The grade of Maple street and Second avenue shall not be depressed below elevation 1911.1 city datum.

The grade of Maple street from this elevation northerly to an intersection with the present surface of the street at the southerly line of Pacific avenue, shall not exceed 0.31 feet in 100 feet.

The grade of Maple street from the aforesaid elevation southerly along Maple street to an intersection with the present surface of the street at a point approximately 110 feet south of the southerly line of Second avenue, shall not exceed 3 feet in 100 feet.

The grade of Second avenue from the aforesaid elevation easterly to an intersection with the present surface of the street at a point approximately 95 feet east of the easterly line of Maple street, shall not exceed 3 feet in 100 feet.

The grade of Second avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at a point approximately 185 feet west of the westerly line of Maple street, shall not exceed 3 feet in 100 feet.

THIRD AVENUE.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Third avenue shall not be depressed below elevation 1913.7 city datum.

The grade of Third avenue from this elevation easterly to an intersection with the present surface of the street at or near the east line of Ash street produced, shall not exceed 2.0 feet in 100 feet.

The grade of Third avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at or near the east line of Oak street, shall not exceed 2.6 feet in 100 feet.

From Third avenue to a point 100 feet south of the south line of Third avenue, the grade of Ash street shall not exceed 2 feet in 100 feet.

FOURTH AVENUE.

Width, face to face of abutments-----	75 feet
Width of roadway-----	40 feet
Width of sidewalks-----	17.5 feet
Minimum vertical clearance-----	12 feet

Supporting posts instead of being placed at the curb line shall be so placed as to provide for a 51-foot roadway, should the same be constructed in the future.

The grade of Fourth avenue shall not be depressed below elevation 1910.0 city datum.

The grade of Fourth avenue from this elevation easterly to an intersection with the present surface of the street at a point approximately 10 feet east of the west line of Oak street shall not exceed 4 feet in 100 feet.

The grade of Fourth avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at or near the east line of Cannon street, shall not exceed 2.1 feet in 100 feet.

The grade of Elm street northerly from the north line of Fourth avenue to an intersection with the present surface to the street, at or near the southerly line of Third avenue shall not exceed 3 feet in 100 feet.

FIFTH AVENUE AND CANNON STREET.

Fifth avenue and Cannon street shall be merged into one crossing, by revising their location and be carried under the elevated tracks through a structure of the following dimensions, to be constructed with abutments at right angle to said tracks.

Width, face to face of abutments	75 feet
Width of roadway	51 feet
Width of sidewalks	12 feet
Minimum vertical clearance	12 feet

The grade of Fifth avenue and Cannon street shall not be depressed below elevation 1905.0 city datum.

The grade of Cannon street from this elevation northerly for a distance of approximately 35 feet to the southerly line of the intersection of Fifth avenue and Cannon street in their revised location shall not exceed 5 feet in 100 feet; the grade across this inter-

section shall be level, and from the northerly line of the intersection to an intersection with the present surface of the street at or near the southerly line of Fourth avenue the grade shall not exceed 4.7 feet in 100 feet.

The grade of Cannon street from the aforesaid elevation southerly to an intersection with the present surface of the street, at or near the northerly line of the alley in Block 24, Cannon's addition, shall not exceed 1.2 feet in 100 feet.

The grade of Fifth avenue easterly from the aforesaid elevation to an intersection with the present surface of the street at or near the west line of Elm street shall not exceed 2.82 feet in 100 feet.

From the intersection of Fifth avenue and Cannon street the grade along Fifth avenue westerly to an intersection with the present surface of the street at or near the east line of Chestnut street shall not exceed 3.1 feet in 100 feet.

The said railway company shall, within six months after the passage and acceptance of this ordinance, procure and dedicate for the purpose of a public street, that portion of Block 11, Cannon's addition to said city, necessary to widen Fifth avenue and Cannon street in their new location to their present width of 75 feet, and shall also execute such instrument to the city as will vest in said city the perpetual right to use for street purposes such portions of the right of way of the railroad company as is included within the limits of said Fifth avenue and Cannon street as changed. In case said railway company shall be unable to purchase said property, or any part thereof, at a price deemed by said company to be reasonable, then the

same shall be condemned by the City of Spokane for street purposes and the compensation and damages awarded in such proceeding, including court costs and other expenses of litigation that may be incurred therein, shall be paid by said railway company, and said company shall have the right to take part in said condemnation proceedings in behalf of the city by counsel employed by it, and shall have the right to have all witnesses that it may name called to testify in such condemnation proceedings.

SIXTH AVENUE.

Width, face to face of abutments.....	60 feet
Width of roadway.....	40 feet
Width of sidewalks.....	10 feet
Minimum vertical clearance.....	12 feet

Sixth avenue shall be opened, graded and improved by the city through an assessment district as provided by law, and the railway company, by its acceptance of this ordinance, shall be deemed to have consented to the opening of Sixth avenue across its right of way, and to have waived any claim for compensation therefor, provided it is not required to bear any part of the cost of opening, grading, and otherwise improving said street, other than what it may be legally assessed for such property as it has abutting said Sixth avenue, after being opened. The bridge shall be constructed by the railway company at its expense.

The surface of the street shall not be established at a higher elevation than elevation 1900.5 city datum, at any point under the elevated structure of the railway company.

Section 7. All damages to property arising from the re-establishment of grades of those portions of Stevens, Post, Lincoln, Monroe, Madison, Jefferson and Adams Streets, lying north of the railway company's tracks, as hereinbefore provided, except the property owned by the railway company, shall be paid by the city either directly or by means of an assessment district legally created therefor. The railway company, by its acceptance of this ordinance, waives any claim for abuttal damages by reason of the re-establishment of the grades of said streets, and shall be relieved by the city from any local improvement assessments imposed, or which might be legally imposed, for the purpose of paying for any abuttal damages resulting from said re-establishment of grades.

Section 8. The city of Spokane undertakes forthwith upon the acceptance of this ordinance, by the necessary proceedings to legally establish the changes in the grades of the streets, avenues and alleys specified in section 6 hereof.

Section 9. All sidewalks and curbs in the streets and avenues where changes of grade are to be made under the provisions of this ordinance, shall be placed at such elevation above the grade of the streets and avenues as the city council may direct.

Section 10. Excepting, as herein otherwise provided, the railway company shall, after it has made the changes in the grades, of the streets, avenues and alleys herein authorized, restore all paving and sidewalks that it may disturb in carrying out the work to as nearly as possible their former condition of usefulness, using the same kind of material, excepting

where on account of increase of grade the city council may require the use of a different kind of material, in which event such other material shall be used. When the tracks have been removed from any of the present street surfaces at any crossing where the tracks are to be elevated as herein provided, the railway company shall with reasonable dispatch thereafter, grade, pave, and provide curbs and sidewalks for that portion of the street upon its right of way situated between the existing paving and sidewalks on each side, and in such manner and with such material as shall conform thereto.

Section 11. The railway company shall provide for the drainage of the several crossings as provided for in this ordinance, by the construction of receiving basins properly located in or immediately adjacent to said crossings, which said receiving basins shall be connected with and discharge their contents into city sewers.

Section 12. The railway company is hereby permitted and authorized to enter upon the streets, avenues and alleys, and make such excavation and do such work, as may be necessary to carry out the separation of grade as herein provided, also to obstruct or close temporarily any streets, avenue or alleys to such extent and for such length of time as may be reasonably necessary; also make temporary changes in its tracks at the present street grade crossings and construct and maintain temporary structures and falsework in the streets, avenues and alleys, subject to the approval of the commissioner of public works.

Section 13. All water pipes, sewers and other utili-

ties owned by the city, including all service connections necessary with the abutting property, shall be moved to the position made necessary by the change of grade in streets, avenues and alleys under this ordinance by the city, under the supervision of the commissioner in charge of such utilities at such a time and in such manner as will interfere as little as possible with the work being carried on by the railway company.

The cost and expense of changes in position of utilities owned by the city, made necessary by the change of gradient, including the replacement of such utilities at the proper depth to secure as nearly as may be their former state of usefulness, shall be borne by the railway company, and the cost shall be paid into the city treasury monthly upon the rendering to the railway company by the proper department of the city, bills for the expense incurred in this work during the previous month.

All work upon the streets, avenues, and alleys required to be done by the railway company, under this ordinance, shall be performed to the satisfaction of the commissioner of public works.

Section 14. The railway company, by its acceptance of this ordinance, agrees to indemnify and save harmless the city from all loss, costs and damages which it may suffer, or which may be recovered against it, on account of damage to persons or property arising out of the performance of any of the work to be done by the railway company, or by the city, under the provisions of this ordinance, including the damage to abutting property resulting from re-establishment of

street and including lawful damage resulting from street vacations.

Section 15. The city of Spokane will exercise to the full extent its police and other powers, to require all persons and corporations occupying or using any portions of the public streets, avenues or alleys affected by the provisions of this ordinance to conform, at their own expense, such occupation or use to the grade changes, alignment and structures herein provided for, and to that end to do all the excavating, filling and other work necessary to such conformation, and to require all street railway companies to also repave that portion of such streets between their rails, and where there are two or more tracks, between their tracks, all of such work to be done at such times and in such manner as to cause the minimum amount of interference or hindrance to the work of the railway company, and nothing in this ordinance shall be construed as relieving any person or corporation, so occupying or using such streets, avenues or alleys, from liability to make such changes and do such work at their own sole cost and expense. If it should transpire that the powers of the city are inadequate to that end, then the city will prosecute such condemnation proceedings as may be necessary, and the railway company shall pay such judgments as may be finally awarded and the costs of such proceedings.

Section 16. The railway company shall bear all the expense of effecting the separation of grades in the manner herein provided, including the damages to abutting property resulting from the changes in the streets, avenues and alleys herein authorized, excepting

such expenses as are to be borne by corporations or individuals under the provisions of sections 6 and 15 hereof, and such abuttal damages as are to be borne by the city under the provisions of section 7 hereof, and if suit shall be brought against said city to recover damages on account of said changes, timely notice thereof shall be given the railway company, and it shall have the right to defend the same in the name of the city, and no such suit shall be settled without the consent of the railway company. If it shall become necessary for said city to bring condemnation suits in furtherance of the work to be done under the terms of this ordinance, said city shall bring the same upon request of said railway company, and said railway company shall aid in and have the right to control the prosecution of said suit through counsel selected by it.

Section 17. The city of Spokane undertakes by appropriate proceedings to vacate such portions of any street, avenue or alley as are upon the right of way of the railway company in the district between Sprague avenue and Division street on the east, and Sixth avenue on the west, and across which overhead bridges are not to be constructed by the railway company under the provisions of section 6 hereof, such vacation to be made effective before the tracks are elevated across the streets, avenues or alleys to be vacated.

Section 18. When the railway company has elevated its tracks in accordance with this ordinance, so that the same are ready for use then and thereupon, all provisions of the ordinances of the city of Spokane having for their purpose the protection of street traffic at

grade street crossings, shall cease to be applicable to such railway company as to that portion of its tracks so elevated.

Section 19. Such lighting as may be ordered by the city council to adequately illuminate the streets and sidewalks beneath said bridges shall be provided and maintained by said city at the expense of the railway company. Bills for said lighting shall be paid monthly by the railway company.

Section 20. Said railway company shall begin the work by it to be performed under the terms of this ordinance on or before October 1st, 1912, and thereafter diligently, continuously and in good faith prosecute said work until the separation of grades required by this ordinance is completed, said separation to be completed on or before October 1st, 1915, unless prevented by weather conditions, strike or strikes, or legal proceedings, injunction order, or other process of a court of competent jurisdiction, and said railway company shall give notice in writing, to the corporation counsel of said city, of the institution of legal proceedings or the pendency of any strike or strikes; and said city shall thereupon have the right to intervene in any suit or proceeding and move for a dissolution of injunction or restraining order, or for any other proper order, remedy or relief.

Section 21. Nothing in this ordinance contained shall be deemed to be a waiver or surrender of any of the police powers of the city, or be taken in any way to deprive the city of the right to properly exercise such power.

Section 22. All the work done under the provisions of this ordinance by the Northern Pacific Railway Company, by direct employment of labor or by contract, shall be performed on the basis that citizens of Spokane, married men and men of families, shall be given preference in employment; the lists of the city free employment office are at the disposal of said railroad company to this end.

Section 23. The railway company shall accept the terms and conditions of this ordinance within 45 days after its passage, by filing with the city clerk of said city of Spokane a written acceptance of the same, and if not accepted within said time, said ordinance shall be null and void unless further time be expressly given by the city council.

Sections 24. This ordinance shall take effect and be in force 30 days from and after its passage.

Passed the City Council, Feb. 16, 1912.

W. J. HINDLEY, Mayor.

Attest: C. A. FLEMING, City Clerk.

Service of within answer is hereby acknowledged this 5th, day of Feb., 1913.

(Signed) POST, AVERY & HIGGINS,

For Plaintiffs.

Endorsements: Answer of deft. to Bill of Complaint of H. A. & L. D. Holland Company.

Filed February 5, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States, in and for
the Eastern District of Washington.*

GEORGE TURNER AND BERTHA TURNER,
Plaintiffs.

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Defendant.

IN EQUITY.

To the Honorable the Judges of the District Court
of the United States, in and for the Eastern District
of Washington:

George Turner and Bertha Turner, his wife, as
Plaintiffs, bring this their bill, against the Northern
Pacific Railway Company, a corporation, as defendant;
and thereupon Plaintiffs complain and say:

1. That the Plaintiffs are citizens of the State
of Washington, residing at Spokane, Spokane County,
Washington, in the Eastern District of Washington,
and that the defendant, the Northern Pacific Railway
Company, named as defendant in the caption, is a
corporation duly organized and existing under the
laws of the State of Wisconsin, and having its prin-
cipal place of business in the Eastern District of
Wisconsin, and a citizen of the said State, and an
inhabitant of the Eastern District of the said State;
and that the amount in controversy in this cause as
hereinafter shown is of more than three thousand
dollars in value, exclusive of interest and costs.

2. That plaintiffs are husband and wife, and
that all the property and property rights of either

of them in the State of Washington, including the real property hereinafter described, is held by them and belongs to them as a community under the laws of the State of Washington.

3. That on, to-wit, the 20th day of January, A. D. 1881, the Northern Pacific Railroad Company, a corporation, was the owner in fee and in possession of the following described tract of land to-wit: The North half of Section nineteen (19), Township twenty-five (25) North, Range forty-three (43) East of the Willamette Meridian, lying and being in Spokane County, in the then territory (now State) of Washington; that the said tract of land abutted, on the south, the town of Spokane Falls, then having a population of not to exceed three hundred people; that on, said date, the said Northern Pacific Railroad Company duly and executed and filed and recorded in the office of the Auditor of Spokane County, in said Territory, a town plat of an addition to the said town of Spokane Falls, called Railroad Addition to Spokane Falls, which said addition was laid out upon and occupied the greater part of the tract of land above described, upon which said plat was shown lots and blocks and streets and alleys, with figures and explanatory notes showing the sizes of the said lots and blocks, and the width of the streets and alleys, and with the names of the several streets plainly indicated in writing thereon, and which said plat contained a writing, duly made and executed by and on behalf of said Northern Pacific Railroad Company, dedicating the streets and alleys shown on said plat to the use of the public. A copy of the said town plat is hereunto

attached, and made a part of this bill of complaint and marked "Plaintiff Exhibit A."

4. That in and upon the said town plat, and extending from Washington Street on the east to Adams Street on the west, a Street two hundred twenty-five and seven tenths (225.7) feet wide, was marked and indicated and named and called "Railroad Street," which said Street was in and by the said plat and the dedicatory writing attached thereto, and was intended by the said Northern Pacific Railroad Company to be dedicated to the use of the public as a Street, with a reservation in the said Railroad Company of the right to use and employ the surface of the said Street for the railway tracks and other uses of the said Railroad Company, as indicated on said plat, which were to-wit: a single line of track located in approximately the center of said Railroad Street and extending throughout its entire length, with two switch tracks, one on each side of the main track, extending from Post Street on the east to Monroe Street on the west, and with a Depot building on the north side of the northerly switch track, and abutting thereon. And Plaintiffs allege that from the time of the filing of said town plat as aforesaid, Railroad Street became a public street and that it has ever since remained and now is a public street.

5. That thereupon, and immediately thereafter, the said Northern Pacific Railroad Company put upon the market and proceeded to sell and dispose of to the public, for a consideration in money, the lots and blocks marked and described on the said town plat, and that prior to the year 1889 it had sold to indivi-

viduals, and conveyed by deeds with the usual covenants of warranty, all or nearly all the lots and blocks shown on the said town plat as abutting on Railroad Street, describing the same in the said deeds by reference to the plat filed as aforesaid, and that on, to-wit: December 14, 1881, it sold to Plaintiff's grantor, and conveyed to him by deed with the usual covenants of warranty, lots One (1) and Two (2), in Block Thirteen (13) of said Railroad Addition, describing the same in the said deed solely by reference to the said town plat, and Plaintiffs by mesne conveyances from the grantee of the said Railroad Company, are now the owners in fee of said lots One and Two, Block Thirteen of said Railroad Addition; said lots abut on Railroad Street and Plaintiffs have erected two buildings on said lots abutting on said Railroad Street, at a cost to them of approximately Three Hundred Thousand Dollars, which said buildings are now standing intact and in use. One of the said buildings is a six story office building, and the other a theatre building intended and designed and now used and employed for theatrical presentations.

6. That immediately after the filing and recording of the said town plat, Railroad Street was thrown open to public use as a street by the said Northern Pacific Railroad Company, and was used and employed as a street by the public, with the knowledge and consent of the said Railroad Company, for more than ten years, during which time it sold to individual members of the public the lots abutting on said Street, and during which time individuals and corporations owning abutting on said street, constructed residence

and business buildings fronting on said street, which were served for purpose of ingress and egress and light and air, and all other street purposes, by said Railroad street, all with the knowledge and consent and the procurement and acquiescence of the said Northern Pacific Railroad Company. In the year 1889 a great fire destroyed all the business part of the then town of Spokane Falls, including all buildings abutting on Railroad Street in the said Railroad Addition, and at the time of the said fire, Railroad Street was one of the principal streets of the said town, built up almost solidly with residences and business buildings, most of them fronting on said Railroad Street, and served by the said street. All of the said buildings then standing on the south side of Railroad Street, except buildings on corner lots, had no other means of access than by and through Railroad Street, and the plaintiffs allege that if for any reason the act of the said Railroad Company in filing and recording the said town plat was ineffective to dedicate Railroad Street as a Street, under the laws of the Territory of Washington, relating to the making and recording of town plats, that the intention and purpose of said Railroad Company, as aforesaid, to open said Railroad Street as a Street following by the opening of the same, and the acceptance and user of the same by the public as a Street as aforesaid, constituted a common law dedication of the said street to the use of the public.

7. That the defendant, the Northern Pacific Railway Company, is now the owner and in possession of all the property and property rights, corporeal or incorporeal, of the said Northern Pacific Railroad Com-

pany, having succeeded to them in the year 1896 by purchase at a Judicial sale of the said property and property rights, and is engaged in operating the line of railway formerly owned and operated by the last named Company from Lake Superior to Puget Sound, which said line of railway passes through the City of Spokane, (formerly the town of Spokane Falls) on the surface of Railroad Street in the said City.

8. That at the time of the dedication of Railroad Street, as Plaintiffs are informed and believe, and on such information and belief allege, it was not believed or intended by the said Northern Pacific Railroad Company that the said town would or should grow to any appreciable extent, and it was believed that the uses and purposes reserved to the said Railroad Company, and shown on the town plat of its addition to Spokane Falls, would at all times be sufficient for the purposes of its business, and Plaintiffs allege that the uses and purposes so shown on the said town plat were the only uses and purposes intended to be reserved by it, and the only uses and purposes that were in fact and in law reserved by it in its plat dedicating to the public the streets and alleys of Railroad Addition to Spokane Falls. Since the filing and recording of said town plat the name of the town of Spokane Falls has been changed to that of the City of Spokane, and the population of the City of Spokane has grown to approximately one hundred and twenty-five thousand people, and all or nearly all of the lots and blocks of Railroad Addition, including those abutting on Railroad Street, are in private ownership, and have been improved by the erection of business

buildings costing in the aggregate many millions of dollars. From the year 1881 to the year 1896 the said Railroad Street was used and employed by the said Northern Pacific Railroad Company for certain of its tracks laid upon the surface of the street, and for a small Depot building in the center of the Street, but not otherwise, and since the year 1896 the said Street has been used and employed by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, for the use of its tracks upon the surface of said street, but not otherwise; and all lots and blocks in Railroad Addition, and the lots and blocks in said Addition abutting on Railroad Street in particular, would be seriously injured and damaged by any further uses of said Railroad Street than that reserved in the dedication of Railroad Addition, and that to which it has been put for now more than thirty years, and particularly by any structure placed in the said Street which will close the same to the public or impair the full use of the same as a street by the public and the abutting owners; yet notwithstanding that fact, and in violation of the rights of the owners of lots abutting on Railroad Street, the defendant, the Northern Pacific Railway Company has threatened to and is now about to proceed to build and erect in said Railroad Street, extending its entire length through Railroad Addition, a dirt fill or embankment, secured by retaining walls of concrete or stone masonry, approximately fifteen feet high, and occupying the said Street for a width of Eighty-five feet for the purpose of carrying its tracks at an elevation instead of upon the surface of said

street as at present, which said dirt fill or embankment will destroy Railroad Street, or seriously impair its use and enjoyment by the public, and by the abutting lot owners, for purposes of access and light and air and other beneficial use and enjoyment of their property, and in addition when the said structure is built and trains are operated on it, the trains will cast upon abutting properties, and upon other property in the vicinity, dirt, dust, cinders, smoke, deleterious gases, and other poisonous deleterious and offensive substances, and will cause great access of noise and of jarring from the operation of trains, to such an extent as to seriously interfere with the enjoyment of the real property in the vicinity, and to render the improvements on said property unfit for residence or business purposes, all to the greatly increased detriment of abutting properties. The Theatre building erected on the abutting lots of the Plaintiffs will, from the causes aforesaid, be rendered valueless or of but little value, and the office building of Plaintiffs erected on the same lots, will be greatly impaired for the purposes of rental and will be greatly diminished in value. The diminution in value to the abutting lots of Plaintiffs and the buildings erected thereon, if the said elevated structure in Railroad Street be built, and maintained, will be more than One Hundred and Twenty-five Thousand Dollars, and plaintiffs will be damaged to that amount.

9. That it is contemplated and intended by the defendant, as Plaintiffs are informed and believe, and on such information and belief allege, when the said elevated structure shall be built and tracks laid thereon,

to receive and transport on the said tracks through the City of Spokane, the freight traffic, both of its own and of other transcontinental railroad lines, both east and west bound traffic, and that the said elevated structure is to be built for that purpose, and for none other; that the operation of heavy freight trains over the said structure will be so continuous or at such short intervals, and the said trains will cause such noise and produce such jarring and will cast such quantities of dirt, dust, cinders, smoke, and deleterious gases, that the same will impair the enjoyment and impair the value of all real property situated on or in the vicinity of said Railroad Street; that Railroad Street extends east and west through the heart of the business center of the City of Spokane, and some of the most valuable business property in the said City with the most valuable improvements thereon, lies and abuts upon each side of said Railroad Street, and Plaintiffs allege that, situated as it will be, and used for the purpose contemplated, the said elevated structure will be a nuisance per se and without reference to its situation and character as an unlawful obstruction of Railroad Street.

10. That the defendant pretends to be acting under the duress and compulsion of a mandatory ordinance of the City of Spokane, requiring it to elevate its tracks on Railroad Street so that the same will pass over the cross streets at a sufficient height to permit traffic on the cross streets to pass thereunder without hindrance; that while it is true that the said ordinance professes to order and require the defendant to separate its grade from that of the street grades by elevating

the plane of its tracks, the said ordinance contains the following controlling provision: "Section 23. The Railway Company shall accept the terms and conditions of this ordinance within forty-five days after its passage, by filing with the City Clerk of said City of Spokane a written acceptance of the same, and if not accepted within said time, said ordinance shall be null and void unless further time be expressly given by the City Council." Said ordinance was drafted and presented to the City Council by the defendant, and its passage was solicited by the defendant, which has solicited a similar ordinance from the City Council for many years, but had always been defeated in its efforts to have such an ordinance passed by the protest of the citizens and property owners of the City of Spokane. The purpose of the defendant in seeking the passage of said ordinance was to improve the grade of its railway through the City of Spokane, so that it might with greater ease and less cost, haul its own east and west bound freight traffic, and that of other transcontinental railroads through the City of Spokane, and no consideration of the public health or safety actuated it in seeking the passage of the ordinance, nor, as Plaintiffs verily believe, actuated the Council of the City of Spokane in the passage of the said ordinance; and Plaintiffs allege that the passage of the said ordinance in the guise of a mandatory ordinance, when it was in truth merely a permissive ordinance was a lawless and arbitrary exercise of power on the part of the City Council, instigated by the defendant, for the purpose of destroying or curtailing the rights of owners of property abutting on Railroad

Street, in opposing the building of the elevated structure in Railroad Street, or failing that, in securing adequate damages for injuries inflicted on their property by the building of said structure.

Plaintiffs allege that the said ordinance is absolutely void because the subject matter of the same is, by the laws of the State of Washington, committed to the exclusive jurisdiction of another and different agency of the State, to-wit, the Public Service Commission of the State, and because the said ordinance undertakes to authorize without authority in the City Council to so authorize an obstruction of one of the public streets of the City of Spokane, and that it is also void as an attempt on the part of the Council of the City of Spokane to authorize the maintenance and operation of the defendant's railroad through the City of Spokane in a manner that will constitute the same a public nuisance irrespective of its effect as an obstruction of Railroad Street, and Plaintiffs allege further that if the said ordinance be valid, it confers no authority on the said defendant to obstruct Railroad Street in the manner aforesaid and for the purpose aforesaid, without first having had ascertained and determined in the manner provided by law, the extent of the loss and injury inflicted on real property abutting on said Railroad Street by the structure aforesaid, and without first paying to the owners of such abutting property the loss and injury so found and ascertained. But the said defendant pretends that the ordinance of the City of Spokane before referred to, authorized it to erect and maintain the said structure and to operate its line of railway thereon,

without regard to the injurious effects of the same on the abutting owners, and without making to them compensation for the injurious effects thereof upon their abutting property, and it denies that they are entitled to compensation in the premises, and the said defendant will, pursuant to the pretended authority of the ordinance aforesaid, proceed to erect and build the said structure and to maintain the same, and to operate its freight and passenger trains over the same, unless restrained by the injunction of this Honorable Court.

11. All of which actings, doings, and pretenses of the said defendant, are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of the Plaintiffs in the premises. In consideration whereof, and forasmuch as the Plaintiffs are remediless in the premises, at and by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, Plaintiffs pray:

1. That a writ of subpoena issue against the defendant, the Northern Pacific Railway Company, requiring it to appear in this Court and answer this bill of complaint, but without oath, all answers under oath being hereby expressly waived, and to stand and abide such orders and decrees as the Court may from time to time make, adjudge and enter in the premises.

2. That pending the final determination of the subject matter hereof, a preliminary injunction issue restraining the said defendant from constructing, building, or maintaining in Railroad Street the elevated structure in this bill described or any structure of a

similar kind or character, and that on final hearing the Court render a decree perpetually enjoining and restraining the defendant from constructing, building and maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that if, pending the final hearing, the defendant shall have constructed and built such structure in Railroad Street, in whole or in part, that the Court, as part of its final decree, issue a mandatory injunction requiring and compelling the defendant to remove the said structure from Railroad Street and to restore the said Street to the condition in which it was before the building and erection of said structure.

3. That if for any cause the Court shall consider that the defendant is entitled to build and erect said structure in Railroad Street, that this cause be retained and that the Court issue a perpetual injunction enjoining and restraining the defendant from building, erecting and maintaining the said structure, as alleged in the complaint, until it shall have caused to be ascertained and paid, in the manner provided by the constitution and laws of the State of Washington, compensation for the property of the Plaintiffs taken and damaged by the building, erection and maintenance of said structure as aforesaid.

4. And for such other and further relief as to the Court shall seem meet and equitable.

(Signed) TURNER & GERAGHTY.

(Signed) POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

State of Washington,
County of Spokane,—ss.

Before me, the undersigned Notary Public, in and for the State and County aforesaid, personally appeared George Turner, one of the above named Plaintiffs, who, on being duly sworn, deposes and says: that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters stated on information and belief, and as to these matters he believes it to be true.

(Signed) GEORGE TURNER.

Subscribed and sworn to before me this 6th day of January, 1913.

(Signed) J. M. GERAGHTY,
Notary Public.

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Spokane Falls.



Endorsement: Bill of Complaint of Geo. Turner, et ux.

Filed January 7, 1913.

W. H. HARE, Clerk.
By F. C. Nash, Deputy.

*In the District Court of the United States, in and for
the Eastern District of Washington, Northern
Division.*

GEORGE TURNER AND BERTHA TURNER,
Plaintiffs,

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Defendant.

No. 1581.

IN EQUITY.

The answer of The Northern Pacific Railway Company, defendant, to the complaint of George Turner and Bertha Turner,

This defendant answers and says:

1. Admits that plaintiffs are citizens of the State of Washington, residing in the Eastern District of Washington and that defendant is a corporation organized and existing under the laws of the State of Wisconsin and a citizen and inhabitant of said state; admits that the amount in controversy in this cause is more than three thousand dollars, exclusive of interest and costs.

2. Admits that plaintiffs are husband and wife and that the property in their bill described is held by

them and is owned by them as a community under the laws of the State of Washington.

3. Admits that on, to-wit, the 20th day of January, 1881, the Northern Pacific Railroad Company did own in fee the North one-half (N 1-2) of Section Nineteen (19), Township Twenty-five (25) North Range Forty-three (43) East of the Willamette Meridian, lying in Spokane County, in the then territory, now State of Washington; admits that such tract of land abutted on the south, the then town of Spokane Falls having a population of not to exceed three hundred people; admits that on to-wit: the 20th day of January, 1881, said railway made and filed and caused to be recorded in the office of the Auditor of Spokane County in said Territory, a town plat of an addition to the said Town of Spokane Falls, called Railroad Addition to Spokane Falls, and that said addition was laid out upon and occupied a portion of the land aforesaid; and admits that upon said plat was shown lots and blocks and streets and alleys and the names of the streets and the width of the streets and alleys; admits that the copy attached to said bill of complaint marked "plaintiffs' exhibit A" is substantially a correct copy of said plat. Further answering in respect of said town plat, defendant says that the dedicatory writing on the paper whereon said plat is delineated, signed by John W. Sprague, and to which is attached a certificate of his acknowledgment thereto before one E. E. Cooper, a Notary Public, under date of December 8, 1880, contained an exception from the dedication of the marked streets on said plat of that strip of land 225.7 feet in width, designated as Railroad Street, and that such

exception from the dedication is to be read in connection with the dedication and in connection and as a part of the whole plat, and each and every part thereof.

Further answering the averments of the bill in respect to the ownership of the real estate occupied by said town plat, defendant says:

The Northern Pacific Railroad Company acquired title to a strip four hundred feet in width, across said land, to-wit: two hundred feet in width on each side of the centre of its main track as marked and shown on said town plat in "Railroad Street" for the right of way for its railroad, granted to it by the second section of the act of Congress, approved July 2, 1864, incorporating said company; and that it acquired title to the balance of said land by section three of said act.

4. Defendant denies that upon said plat a street was marked or indicated, as is averred in the fourth paragraph of the complaint, but says that the strip of land marked "Railroad Street" on said plat, was and is by said plat and the dedicatory and explanatory writing thereon and a part thereof excepted from dedication as a street either in whole or in part; denies that the Northern Pacific Railroad Company in and by said plat or the dedicatory writing attached thereto, or at all, intended to dedicate said strip of land to the use of the public as a street or at all, or with or without the reservations stated in said bill and particularly stated in Paragraph Fourth; and defendant denies that from the time of filing said plat, or at all, said strip of land became a public street, and denies that it now is a public street.

Further answering the alleged dedication of "Rail-

road Street," defendant says that the Northern Pacific Railroad Company was wholly without power to dedicate said strip of land or any part thereof as a street either with or without reservation, or in any other manner to convey or part with title or easement to or in said strip of land granted to it for a right of way as above alleged; and that if said plat and the writing thereon or any other matter or thing alleged in the bill might or could be constructed as a dedication to public use of the strip of land called "Railroad Street," to the extent alleged in the bill, or at all, the same was and is wholly void and of no effect therefor.

5. Defendant admits that after the filing of said plat the Northern Pacific Railroad Company did put upon the market and sell and dispose of to the public the lots and blocks marked on said plat and that prior to the year 1889 it had so sold and disposed of and conveyed with the usual covenants of warranty, portions of the lots and blocks shown on the said plat as abutting on Railroad Street, and that in a portion of said deeds it did describe said property by reference to the said plat; admits that on or about December 14th, 1889, it did convey to plaintiffs' grantor, lots one (1), and two (2) in block thirteen (13) of said Railroad Addition, describing the same by reference to said town plat, and admits that plaintiffs by mesne conveyances have acquired title to said lots and are now the owners thereof, and that the plaintiffs have erected upon said property the buildings in Paragraph Fifth of the bill mentioned and described.

6. Defendant denies that after the filing of said plat, or at all, the strip of land referred to as "Rail-

road Street” was thrown open to the public use as a street by the Northern Pacific Railroad Company and denies that it was used as a street by the public with the knowledge and consent of the Railroad Company, or at all; denies that individuals and corporations used said street for the purpose of ingress and egress and for light and air, and for other purposes, with the knowledge and consent of the Northern Pacific Railroad Company, or at all; admits the destruction of the business portion of Spokane Falls by fire in 1889, including the buildings near to or abutting upon the strip of land called Railroad Street, but denies that such strip of land was one of the principal streets of the town at that time or at all, and denies that any buildings standing or abutting upon such strip of land had no other means of access, and denies that the intention and purpose of said Railroad Company was to open said strip of land as a street, and denies that the same was accepted by the public as a street as alleged in said bill, or at all, and denies that the acts and things mentioned in said bill and particularly in Paragraph Sixth thereof, constitutes a common law dedication of said street to the use of the public. And further answering the averments of the bill in respect of the use of said strip of land by the public, the defendant says that such use as the public made thereof was permissive only and for the purposes of the Railroad Company in conveniencing the public having occasion to do business with it.

7. Admits that this defendant is now the owner and in possession of all the property and property rights of the Northern Pacific Railroad Company and that it

succeeded to the same in the year 1896 by purchase at judicial sale and that it is engaged in operating the line of railway formerly owned and operated by the said railroad company from Lake Superior to Puget Sound, and admits that its said line of railway passes through the City of Spokane on the surface of the strip of ground referred to as Railroad Street.

8. Defendant states that it has no knowledge or information as to whether or not the Northern Pacific Railroad Company, at the time of the filing of the said plat, believed that the Town of Spokane Falls would not grow to any appreciable extent, but it denies that there was in law any reservation to the Railroad Company of any uses or purposes in the strip of land marked as "Railroad Street," but avers that in law and in fact the said strip of land was entirely excepted, both by operation of the law, through the words of exception used, and in the intention of the Railroad Company, from dedication as a public street on said plat; defendant admits that since the filing and recording of the plat the name of the Town of Spokane Falls has been changed to the City of Spokane and that the population has grown to approximately 125,000 people, and admits that a portion of the lots and blocks in Railroad Addition abutting upon the strip of land marked upon said plat "Railroad Street" are in private ownership and that some of them have been improved by the erection of business buildings; defendant admits that between the years 1881 and 1896 its said right of way on said tract marked Railroad Street was used and employed by the said Railroad Company for tracks laid upon the surface thereof and for a depot building

thereon, but alleges that said strip of land likewise was used for all of the needed railroad purposes of said company; defendant likewise admits that since 1896 it has used and employed said strip of land for the use of such tracks as it needed in the operation of its road laid upon the surface and has used it likewise at all times since it has been in the possession and ownership thereof for all purposes needed in connection with the operation of its road; defendant denies that the lots and blocks in Railroad Addition in general, and that the lots and blocks in said addition abutting on said strip of land in particular, could be seriously injured and damaged by the use of said land for further additional railroad purposes and for the construction of the elevated tracks thereon as proposed by the defendant under the ordinance referred to in the bill of complaint, and denies that any of said lots and blocks would be injured at all, but on the contrary alleges that all of the same would be benefited by said change of grade and operation of its tracks on said elevated grade; defendant admits that it is about to proceed to build and erect on the strip of land marked Railroad Street in said plat, a dirt fill secured by retaining walls of concrete and stone masonry, approximately fifteen feet high and occupying the strip for a width of about eighty-five feet, for the purpose of carrying its tracks at such elevation instead of upon the surface of said strip as at present; defendant denies, however, that such fill will seriously or at all impair access of light and air or any other beneficial use of any property in said Railroad Addition or to any of the property abutting upon said 225.7 feet strip and denies that

the trains operating thereon will cast upon abutting property or upon other property in the vicinity, dirt, dust, cinders, smoke, deleterious gases, or other poisonous, deleterious and offensive substances and will cause any access of noise or jarring because of the operation of trains, to such an extent as to seriously interfere with the enjoyment of the real property in the vicinity, or to interfere with the enjoyment of the said property at all, or will in any wise render the improvements on said property unfit for residence or business purposes, or will result in any increased detriment to abutting property; denies that the theatre building described in the bill of complaint will be rendered valueless or of little value or will be injured at all, and denies that the office building of plaintiffs, referred to in the bill of complaint, will be impaired for the purposes of rental, or will be greatly diminished in value or diminished in value at all, and denies that plaintiffs will be damaged in any sum.

9. Defendant admits that it contemplates and intends to receive and transport on its tracks through the City of Spokane laid upon said fill, the freight traffic both of its own and of other transcontinental railway lines, and that the said elevated structure is to be built for that purpose, but denies that the trains operating thereon will cause noise or produce jarring or cast dirt, dust, cinders, smoke, or other deleterious gases upon the real property in the vicinity or upon the property of the plaintiffs or that it will in anywise impair the enjoyment or value of the same; defendant admits that valuable business property in the said city and valuable improvements thereon lie and abut upon each

side of said 225.7 feet strip of land, and alleges that said property is used wholly for warehouse purposes and is built abutting said strip of land to obtain easy access to the tracks of the defendant company for the purpose of loading and unloading freight; defendant denies that said elevated fill will be a nuisance per se or at all, or an unlawful or other obstruction of such strip of land.

10. Defendant admits that it is acting in part under the duress and compulsion of an ordinance of the City of Spokane requiring it to elevate its tracks through the city so that traffic upon the city streets shall pass over its right of way and tracks otherwise than at grade, but alleges that in the elevation of its tracks and the change of grade of the strip of land referred to as Railroad Street, it acted also in the exercise of its inherent right and power to make such changes thereon as might be necessary for the proper operation of its railroad system, and that under and by virtue of the grant of Congress to its predecessor in interest, the Northern Pacific Railroad Company, of the right of way in which is included the strip of land referred to herein as Railroad Street, it had the power, and it was its duty, at any time to make such changes in the grade thereof as should be required in the proper operation of its railroad line, and it avers that the change of grade which it proposes to make is required for the proper operation of its railroad lines, and that it is essential to the discharge of its duties to the public that such changes be made, and no act of the Northern Pacific Railroad Company, or this defendant, could or did disable it from exercising its

power to make such changes in the grade of its line as should be necessary in the operation of its railroad system. Defendant admits that the ordinance of the City of Spokane referred to contained the section that is quoted in the tenth paragraph of the complaint; admits that an ordinance was drafted by defendant and presented to the city council, and its passage was solicited by defendant; admits that it has for some time sought the passage of an ordinance relating to the abolition of grade crossings, but denies that the ordinance which was adopted was drafted or presented to the city council by defendant, or that its passage was solicited by defendant, or that it has solicited a similar ordinance from the city council for many years, or at all, and that it has been defeated in its efforts to have such an ordinance passed by the protests of property owners of the City of Spokane. Defendant denies that in endeavoring to secure the abolition of grade crossings, its purpose was to improve the grade of its railway through the City of Spokane; denies that no consideration of the public health or safety actuated it in seeking the passage of an ordinance having that purpose; denies that no consideration of the public health or safety actuated the city council in the passage of the ordinance in question; denies that the enactment of the ordinance was a lawless and arbitrary exercise of power on the part of the city council; denies that it was instigated by defendant; denies that such ordinance was other than it appears to be upon its face; denies that its adoption was for the purpose of destroying or curtailing the rights of abutting property owners to op-

pose the building of the proposed fill upon the strip of land marked Railroad Street, and denies that it was for the purpose of preventing such property owners from securing adequate damages for injuries inflicted to their property by the building of the structure; defendant also denies that the ordinance is void because the subject matter of the same is by the laws of the state committed to the jurisdiction of the Public Service Commission of the state, but avers that if it be the law that the Public Service Commission of Washington is, under the statutes of that state, alone empowered to compel the separation of grade crossings, that fact is utterly immaterial in the case in hand. The City of Spokane has by the ordinance in question provided for the change of the grade of its streets, a matter of which it has exclusive jurisdiction, and as a part of the plan for the change of such streets, as proposed by such ordinance, it is essential that the defendant change the grade of its right of way and tracks as proposed in such ordinance. The defendant is not opposing such change, but has consented thereto, and even if it be that the Public Service Commission alone has power to compel a change of grade over the protest of a Railroad Company, there is nothing in that rule which forbids a city to change the grade of its streets and a railroad company, such as defendant, to make such changes in the grade of its tracks as will permit the city's plans for grade change to be effectual. Defendant denies that the ordinance in question is void because it undertakes to authorize an obstruction of one of the public streets of the City of Spokane; denies that it is void because it is an

attempt to authorize the maintenance and operation of the defendant's railroad through the city in such a manner as will constitute a public nuisance. Defendant denies that such ordinance confers no authority on defendant to make the change in the grade of the strip of land referred to as Railroad Street without first having had ascertained and determined the amount of loss and injury inflicted on real property abutting upon such strip by the change therein, and without first paying to the owners of such abutting property the loss and injury so caused. Defendant admits that it claims that the ordinance in question authorizes it to erect and maintain the fill along such strip as proposed, and to operate its line of railway thereon without regard to the injurious effects, if any there are, resulting to the abutting owners, and without making to them compensation for the injurious effects, if any there are, upon their property; admits that it denies that the property owners along said strip of land are entitled to compensation because of the change in grade thereon, and admits that it will, pursuant to the authority of the ordinance aforesaid, and in the exercise of its inherent power to make such changes in its own property as shall be necessary for the proper operation of its railroad lines, proceed to construct the fill contemplated by the ordinance along the strip of land aforesaid, and will maintain the same thereon, and will operate its freight and passenger trains over the same, unless restrained by the injunction of this court.

Further answering with respect to the ordinance referred to in the bill of complaint and particularly with

respect to the matters and things set forth in the tenth paragraph of such complaint, defendant alleges that its railroad lines, over which are operated numerous transcontinental trains for the carriage of passengers and freight, extend at grade across the whole of the City of Spokane, being a distance of four or five miles, and that many of the streets of the City of Spokane cross its tracks at grade. Where its right of way and tracks run through Railroad Addition over the strip of land referred to as Railroad Street, it is operating in the heart of the business section of Spokane; wholesale houses in all lines of business have located along its tracks and abutting thereupon are large warehouses where goods are received from and shipped out over its lines of railway. These warehouses are for the principal part constructed upon the strip of land referred to as Railroad Street by virtue of permission so to do granted by defendant. In addition to its through freight and passenger trains and many local freight and passenger trains which pass over its tracks through such railroad addition over the strip of land referred to as Railroad Street, the defendant operates thereover many switching trains engaged in the handling of goods from and to the warehouses aforesaid, and the same thing is true along its right of way on both sides of the said Railroad Addition for a distance of a mile or more. The principal part of the business section of the City of Spokane lies to the north of defendant's right of way where it runs through the city, but a considerable business section lies to the south of its tracks, and more than one-half of the residence section of the

city lies to the south of its tracks. In consequence of the location of its right of way through the heart of the city almost equally dividing the population thereof, the traffic across its right of way over the public streets of the city has become very heavy, and is growing greater each year. Street railway lines are laid upon many of the city's streets crossing the defendant's right of way, and street cars are continually passing thereover. So great has the volume of business become that there is ever and imminent danger arising from the crossing of defendant's tracks at grade, not only to those who cross its tracks by a street car or other vehicle or on foot, but to the passengers upon defendant's trains, and the operation of defendant's railroad system through the City of Spokane has been much hindered and impeded, and has been rendered much less efficient than it would be if there were a separation of grades, and in a few years, with the increasing growth of the city, it will become almost impossible to efficiently operate its lines through Spokane. The danger and inconvenience, both to the public and to the defendant, arising from the crossing of defendant's tracks by streets at grade has long been recognized by the people of the City of Spokane, by the city officials, and by the defendant, and it has been the desire of all that such changes might be made in the grades of the city's streets and of the defendant's right of way as should do away with grade crossings. After several years of study, negotiations, and consultation, a plan was arrived at for making changes in the grades of the city's streets and of defendant's right of way, so that a separation

of grade between the right of way and the streets should be accomplished, and to carry out such plan the city council of the City of Spokane, on or about February 16, 1912, duly passed and adopted Ordinance No. C594, a copy of which is attached hereto marked Exhibit A and is prayed to be read as a part of this answer, such ordinance being the same ordinance which is referred to in plaintiff's bill of complaint. The plan of grade separation proposed was agreed to by defendant, and it accepted the terms and conditions of the ordinance in writing, as required by the provisions thereof, and defendant ever since has been and is now willing to comply with such ordinance, and to execute the same in all respects, and even though it had not been so willing to comply with its conditions, the ordinance is mandatory in terms and in character, and the City of Spokane could have compelled defendant to comply therewith.

Still further answering with respect to such ordinance, defendant alleges that therein and thereby the City of Spokane undertook to and did provide for the change of the grade of its streets which have heretofore crossed defendant's right of way and tracks at grade, and that under and by virtue of the laws of the State of Washington the City of Spokane was authorized and empowered in its discretion to make such changes in the grade of its streets. Under and by virtue of such ordinance, the City of Spokane is now proceeding to provide for changes in the grade of its streets where they cross the defendant's right of way and tracks, and is proceeding and will proceed to take all steps which are necessary to make the

changes in the grade of its streets contemplated by the ordinance question. If defendant should in this cause be enjoined from making the change in the grade of its right of way and tracks as provided in such ordinance and as it proposes to do in compliance therewith, the City of Spokane will be prevented from making the change in the grade of its streets which is contemplated by such ordinance, and which it is proceeding to make, for the proposed changes in its streets cannot be made unless, as a part of the plan thereof, the change of grade of defendant's right of way is made as required by such ordinance. To enjoin defendant, therefore, from changing the grade of its right of way and tracks is, in effect, to enjoin the City of Spokane from making the contemplated changes in the grade of its streets and to enjoin the enforcement of a city ordinance, and defendant says that therefore the City of Spokane is a necessary party to this suit to answer with respect to the validity of an ordinance duly adopted by its city council and to defend against any decree the effect of which will be to prevent it from carrying out its schemes of municipal improvement.

11. Defendant denies that anything done or claimed by it with respect to the change of grade in question is contrary to equity or good conscience, and tends to the wrong, injury, or oppression of the plaintiffs, and denies that plaintiffs are remediless in the premises at common law, and can only have relief in a court of equity. It avers, on the contrary, that if it is mistaken with respect to any matter or thing

done, or claimed by it hereunder, and plaintiffs are entitled to compensation by way of damages, or otherwise, by reason of the construction of the fill proposed and the operation of the trains thereover, that then the matter of the compensation to be paid is cognizable by courts of law in proper proceedings brought therefor, and that the same is not subject to the jurisdiction of a court of equity.

All of which matters and things this defendant stands ready to aver and prove as this court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf sustained.

(Signed) CHARLES W. BUNN.

(Signed) EDWARD J. CANNON.

(Signed) GRAVES, KIZER & GRAVES.

Attorneys for Defendant.

EXHIBIT "A"

ORDINANCE NO. C594.

An ordinance requiring the Northern Pacific Railway Company to separate its grade from that of the street grades within a portion of the City of Spokane by elevating the plane of its tracks and by changing the grade of certain of the streets, and affecting certain streets, avenues and alleys of said city.

The City of Spokane does ordain:

Section 1. The Northern Pacific Railway Company is ordered and required to separate its grade from that of the street grades by elevating the plane of its tracks and by changing the grade of certain of the streets, within the portion of the City of Spokane hereinafter set forth, in the manner and upon the conditions hereinafter specified.

Section 2. The district within which said railway company shall effect the separation of its grade from the street grade shall extend from and including Sprague avenue and Division street on the east to and including Sixth avenue on the west and all streets and avenues excepting those to be vacated as hereinafter provided within the limits of said district, shall be crossed at an elevation and in the manner herein provided.

Section 3. As soon as the railway company has completed the separation of grades as herein provided, it shall remove all of its tracks from the present surface of the streets within the district described in Section 2 of this ordinance, and shall not thereafter lay down any tracks across streets at grade within such district, but the railway company may at any time construct, maintain and operate additional tracks across streets within said district in accordance with the specifications in this ordinance contained.

Section 4. Said separation, except at street crossings, and as otherwise in this section provided, shall be accomplished by an embankment of earth or other suitable filling material and in the district extending from Sprague avenue and Division street on the east to Walnut street on the west, said embankment shall be retained by walls of concrete or stone masonry carried up to the subgrade of the roadbed. From the point where the walls terminate at or near Walnut street westerly to Sixth avenue, a substantial iron fence of design satisfactory to the city council, with concrete or masonry posts shall be constructed between the streets and connected at each with the bridge abut-

ments; provided that between Brown street and Washington street such separation may be accomplished by structures of concrete, steel or iron, or a combination of these materials. Such materials may also be used at other places between streets according to plans and specifications to be submitted to and approved by the city council.

Section 5. Said elevated tracks shall be carried across the streets and avenues specified herein upon bridges constructed of iron, steel or concrete, or a combination of these materials, supported at the end upon abutments of concrete or stone masonry, so located that the exposed face of the said abutments shall be parallel to and coincident with or entirely outside the outside limits of the streets or avenues, and supported intermediately by three rows of columns, one of which shall be placed parallel to and within the established curb on each side of the streets, the remaining row shall be so placed that the center of same coincides with the center of the street; the minimum spacing of the columns parallel with the street shall be 13 feet between centers. Said bridges shall have substantial ballasted floors and shall be so constructed and maintained as to prevent water, dirt, oil or other substances from dropping from the elevated structure into the street. Walls and posts of said bridges shall be calcimined, painted or otherwise kept in a sightly and cleanly condition upon order of the city council. The bridge across Washington street shall be supported intermediately by one row of columns so placed that the center of the same coincides with the center of the street. Said bridges shall conform generally in their

essential features to the plan attached and made a part of this ordinance and marked "Northern Pacific Railway Company, Spokane Grade Separation, typical plan for 75-foot street crossing at right angles to tracks."

Section 6. The elevated street crossings herein referred to shall be constructed in accordance with the following conditions and specifications, and the word "grade," as used in said specifications shall be understood to mean in all cases the elevations and rate of grade of the center lines of the streets. These grades and elevations may be varied at the discretion of the commissioner of public works, to the extent necessary, to give proper drainage to all points of the streets affected, to give proper crowning of the roadways and to provide for vertical curves where the algebraic sum of the rates of grades equals or exceeds 3 per cent.

SPRAGUE AVENUE AND DIVISION STREET.

	Sprague Avenue	Division Street
Width, face to face of abutment---	75 feet	75 feet
Width of roadway -----	51 feet	51 feet
Width of sidewalks-----	12 feet	12 feet
Minimum vertical clearance-----	14 ft 6 in.	12 feet

The existing surfaces of Sprague avenue and Division street shall not be depressed below elevation 1921.7 city datum.

From the aforesaid elevation, easterly to an intersection with the present surface of the street, at or near the east side of Hilliard street, the grade of Sprague avenue shall not exceed 3.6 feet in 100 feet. From the aforesaid elevation westerly to an intersection with

the present surface of the street at or near Browne street, the grade of Sprague avenue shall not exceed four (4) tenths foot in 100 feet.

From the aforesaid elevation northerly to an intersection with the present surface of the street at a point near the south side of Riverside avenue, the grade of Division street shall not exceed 1.62 feet in 100 feet.

From the aforesaid elevation southerly to a point approximately 75 feet south of the south line of Sprague avenue, the grade of Division street shall not exceed 3.57 feet in 100 feet, and from the last described point to an intersection with the present surface of the street, at a point near the south line of First avenue, the grade of Division street shall not exceed three and four-tenths (3.4) feet in 100 feet.

From Division street to the west side of Pine street the grade of First avenue shall not exceed 2.21 feet in 100 feet; across Pine street the grade shall be level, and from the east side of Pine street to an intersection with the present surface of the street at or near the west side of Hilliard street, the grade of First avenue shall not exceed 5.27 feet in 100 feet.

From Sprague avenue to the northerly curb line of First avenue the grade of Pine street shall not exceed 4.7 feet in 100 feet; between curb lines of First avenue the grade of Pine street shall not exceed 1.82 feet in 100 feet, and from the southerly curb line of First avenue to the northerly line of Pacific avenue, the grade of Pine street shall not exceed 5.71 feet in 100 feet. From the northerly line of Pacific avenue to an intersection with the present surface of the street at or near the south line of Pacific avenue, the grade of

Pine street shall not exceed 0.66 feet in 100 feet.

The railway company shall grade at a gradient not exceeding 12 feet in 100 feet east and west from Pine street approaches in the alleys in blocks seven (7) and eight (8) of Saunders' addition to Spokane, and whenever these alleys or either of them are graded or improved any additional cost in the work incurred by reason of the changes in grades of Division and Pine streets, as in this ordinance provided, shall be borne by the railway company.

BROWNE STREET.

Width, face to face abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Browne street shall not be depressed below elevation 19123.3 city datum.

From the aforesaid elevation northerly to an intersection with the present surface of the street at or near the south line of Sprague avenue, the grade of Browne street shall not exceed 1.5 feet in 100 feet.

From the aforesaid elevation southerly to an intersection with the present surface of the street at or near the northerly line of Pacific avenue, the grade of Browne street shall not exceed 4.6 feet in 100 feet.

The railway company shall grade at a gradient not exceeding 12 feet in 100 feet, east from Browne street, an approach in the alley in block 2, First addition to Fourth addition to Railroad addition to Spokane, and whenever this alley is graded or improved, and additional cost in the work incurred by reason of the

change in grades of Browne street as in this ordinance provided, shall be borne by the railway company.

WASHINGTON STREET.

Width, face to face abutments_____	74 feet
Width of roadway_____	51 feet
Width of sidewalks_____	11 feet 6 in.
Minimum vertical clearance_____	18.2 feet

The grade of Washington street shall remain as it now exists.

STEVENS STREET.

Width, face to face abutments_____	75 feet
Width of roadway_____	51 feet
Width of sidewalks_____	12 feet
Minimum vertical clearance_____	12 feet

The grade of Stevens street shall not be depressed below elevation 1918.0 city datum.

The grade of Stevens street shall continue northerly on this elevation to an intersection with the present gradient of Stevens street from First avenue to a point 124.9 feet south of the south line of First avenue extended southerly.

From the aforesaid elevation southerly to an intersection with the present surface of the street, approximately 240 feet north of the northerly line of Second avenue, the grade of Stevens street shall not exceed 3 feet in 100 feet.

HOWARD STREET.

Width, fact to face of abutments_____	75 feet
Width of roadway_____	51 feet
Width of sidewalks_____	12 feet
Minimum vertical clearance_____	14 feet 6 in.

The grade of Howard street shall not be depressed below elevation 1914.7 city datum.

The grade of Howard street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 155 feet south of the south line of First avenue.

From the aforesaid elevation southerly to an intersection with the present surface of the street at or near the north line of the alley in Blocks 28 and 29, Railroad addition to Spokane, the grade of Howard street shall not exceed 2.4 feet in 100 feet.

WALL STREET.

Width, face to face of abutments-----	66 feet
Width of roadway-----	42 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Wall street shall not be depressed below elevation 1916.8 city datum.

The grade of Wall street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 225 feet south of the southerly line of First avenue.

From the aforesaid elevation southerly to an intersection with the present surface of the street at a point approximately 270 feet north of the northerly line of Second avenue, the grade of Wall street shall not exceed 3 feet in 100 feet.

POST STREET.

Width, face to face of abutments-----	66 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Post street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 155.06 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 2.4 feet in 100 feet.

LINCOLN STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Lincoln street shall remain as it now exists, unless the city shall decide to change the grade of same from the south line of First avenue to a point 155.22 feet southerly from the south line of First avenue, before it is necessary for the Northern Pacific to pave that portion of Lincoln street lying between their present right of way limits, in which case the Northern Pacific shall regrade, repave, recurb and re-sidewalk and otherwise improve said Lincoln street corresponding to the improvements on either side of their right of way from a point 155.22 feet south of the south line of First avenue to a point 300 feet north of the north line of Second avenue, at such grades as the city shall by ordinance establish therefor.

MONROE STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	13 feet 6 in.

The grade of Monroe street shall be depressed to such an extent that a uniform grade will extend from the present grade of the ground at a point 155.44 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 3.3 feet in 100 feet.

MADISON STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Madison street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 155.63 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 3.2 feet in 100 feet.

JEFFERSON STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Jefferson street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 156 feet south from the south line of First avenue to an intersection with the present surface of the ground at or

near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid limits shall not exceed 3.3 feet in 100 feet.

ADAMS STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Adams street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 156 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid limits shall not exceed 2.4 feet in 100 feet.

CEDAR STREET.

Width, face to face of abutments-----	100 feet
Width of roadway-----	68 feet
Width of sidewalks-----	16 feet
Minimum vertical clearance-----	12 feet

The grade of Cedar street shall remain as it now exists.

WALNUT STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	14 feet 6 in.

The grade of Walnut street shall not be depressed below elevation 1910.4 city datum.

The grade of Walnut street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 10 feet south of the northerly line of Pacific avenue produced.

The grade of Walnut street from the aforesaid elevation southerly to an intersection with the present surface of the street at a point approximately 90 feet north of the northerly line of Second avenue, shall not exceed 3 feet in 100 feet.

From Walnut street to a point 100 feet west of the west line of Walnut street, the grade of Pacific avenue shall not exceed 2 feet in 100 feet.

MAPLE STREET AND SECOND AVENUE.

	Maple Street	Second Avenue
Width between outside supports of bridge -----	75 feet	75 feet
Width of roadway-----	51 feet	51 feet
Wide of sidewalks-----	12 feet	12 feet
Minimum vertical clearance-----	14 ft. 6 in.	12 feet

The grade of Maple street and Second avenue shall not be depressed below elevation 1911.1 city datum.

The grade of Maple street from this elevation northerly to an intersection with the present surface of the street at the southerly line of Pacific avenue, shall not exceed 0.31 feet in 100 feet.

The grade of Maple street from the aforesaid elevation southerly along Maple street to an intersection with the present surface of the street at a point approximately 110 feet south of the southerly line of Second avenue, shall not exceed 3 feet in 100 feet.

The grade of Second avenue from the aforesaid elevation easterly to an intersection with the present surface of the street at a point approximately 95 feet east of the easterly line of Maple street, shall not exceed 3 feet in 100 feet.

The grade of Second avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at a point approximately 185 feet west of the westerly line of Maple street, shall not exceed 3 feet in 100 feet.

THIRD AVENUE.

Width, face to face of abutments.....	75 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Third avenue shall not be depressed below elevation 1913.7 city datum.

The grade of Third avenue from this elevation easterly to an intersection with the present surface of the street at or near the east line of Ash street produced, shall not exceed 2.0 feet in 100 feet.

The grade of Third avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at or near the east line of Oak street, shall not exceed 2.6 feet in 100 feet.

From Third avenue to a point 100 feet south of the south line of Third avenue, the grade of Ash street shall not exceed 2 feet in 100 feet.

FOURTH AVENUE.

Width, face to face of abutments.....	75 feet
Width of roadway.....	40 feet

Width of sidewalks-----	17.5 feet
Minimum vertical clearance-----	12 feet

Supporting posts instead of being placed at the curb line shall be so placed as to provide for a 51-foot roadway, should the same be constructed in the future.

The grade of Fourth avenue shall not be depressed below elevation 1910.0 city datum.

The grade of Fourth avenue from this elevation easterly to an intersection with the present surface of the street at a point approximately 10 feet east of the west line of Oak street shall not exceed 4 feet in 100 feet.

The grade of Fourth avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at or near the east line of Cannon street, shall not exceed 2.1 feet in 100 feet.

The grade of Elm street northerly from the north line of Fourth avenue to an intersection with the present surface to the street, at or near the southerly line of Third avenue shall not exceed 3 feet in 100 feet.

FIFTH AVENUE AND CANNON STREET.

Fifth avenue and Cannon street shall be merged into one crossing, by revising their location and be carried under the elevated tracks through a structure of the following dimensions, to be constructed with abutments at right angle to said tracks.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Fifth avenue and Cannon street shall

not be depressed below elevation 1905.0 city datum.

The grade of Cannon street from this elevation northerly for a distance of approximately 35 feet to the southerly line of the intersection of Fifth avenue and Cannon street in their revised location shall not exceed 5 feet in 100 feet; the grade across this intersection shall be level, and from the northerly line of the intersection to an intersection with the present surface of the street at or near the southerly line of Fourth avenue the grade shall not exceed 4.7 feet in 100 feet.

The grade of Cannon street from the aforesaid elevation southerly to an intersection with the present surface of the street, at or near the northerly line of the alley in Block 24, Cannon's addition, shall not exceed 1.2 feet in 100 feet.

The grade of Fifth avenue easterly from the aforesaid elevation to an intersection with the present surface of the street at or near the west line of Elm street shall not exceed 2.82 feet in 100 feet.

From the intersection of Fifth avenue and Cannon street the grade along Fifth avenue westerly to an intersection with the present surface of the street at or near the east line of Chestnut street shall not exceed 3.1 feet in 100 feet.

The said railway company shall, within six months after the passage and acceptance of this ordinance, procure and dedicate for the purpose of a public street, that portion of Block 11, Cannon's addition to said city, necessary to widen Fifth avenue and Cannon street in their new location to their present width of 75 feet, and shall also execute such instrument to the city as will vest in said city the perpetual right to use for

street purposes such portions of the right of way of the railroad company as is included within the limits of said Fifth avenue and Cannon street as changed. In case said railway company shall be unable to purchase said property, or any part thereof, at a price deemed by said company to be reasonable, then the same shall be condemned by the City of Spokane for street purposes and the compensation and damages awarded in such proceeding, including court costs and other expenses of litigation that may be incurred therein, shall be paid by said railway company, and said company shall have the right to take part in said condemnation proceedings in behalf of the city by counsel employed by it, and shall have the right to have all witnesses that it may name called to testify in such condemnation proceedings.

SIXTH AVENUE.

Width, face to face of abutments-----	60 feet
Width of roadway-----	40 feet
Width of sidewalks-----	10 feet
Minimum vertical clearance-----	12 feet

Sixth avenue shall be opened, graded and improved by the city through an assessment district as provided by law, and the railway company, by its acceptance of this ordinance, shall be deemed to have consented to the opening of Sixth avenue across its right of way, and to have waived any claim for compensation therefor, provided it is not required to bear any part of the cost of opening, grading, and otherwise improving said street, other than what it may be legally assessed for such property as it has abutting said Sixth

avenue, after being opened. The bridge shall be constructed by the railway company at its expense.

The surface of the street shall not be established at a higher elevation than elevation 1900.5 city datum, at any point under the elevated structure of the railway company.

Section 7. All damages to property arising from the re-establishment of grades of those portions of Stevens, Post, Lincoln, Monroe, Madison, Jefferson and Adams Streets, lying north of the railway company's tracks, as hereinbefore provided, except the property owned by the railway company, shall be paid by the city either directly or by means of an assessment district legally created therefor. The railway company, by its acceptance of this ordinance, waives any claim for abuttal damages by reason of the re-establishment of the grades of said streets, and shall be relieved by the city from any local improvement assessments imposed, or which might be legally imposed, for the purpose of paying for any abuttal damages resulting from said re-establishment of grades.

Section 8. The city of Spokane undertakes forthwith upon the acceptance of this ordinance, by the necessary proceedings to legally establish the changes in the grades of the streets, avenues and alleys specified in section 6 hereof.

Section 9. All sidewalks and curbs in the streets and avenues where changes of grade are to be made under the provisions of this ordinance, shall be placed at such elevation above the grade of the streets and avenues as the city council may direct.

Section 10. Excepting, as herein otherwise provided, the railway company shall, after it has made the changes in the grades, of the streets, avenues and alleys herein authorized, restore all paving and sidewalks that it may disturb in carrying out the work to as nearly as possible their former condition of usefulness, using the same kind of material, excepting where on account of increase of grade the city council may require the use of a different kind of material, in which event such other material shall be used. When the tracks have been removed from any of the present street surfaces at any crossing where the tracks are to be elevated as herein provided, the railway company shall with reasonable dispatch thereafter, grade, pave, and provide curbs and sidewalks for that portion of the street upon its right of way situated between the existing paving and sidewalks on each side, and in such manner and with such material as shall conform thereto.

Section 11. The railway company shall provide for the drainage of the several crossings as provided for in this ordinance, by the construction of receiving basins properly located in or immediately adjacent to said crossings, which said receiving basins shall be connected with and discharge their contents into city sewers.

Section 12. The railway company is hereby permitted and authorized to enter upon the streets, avenues and alleys, and make such excavation and do such work, as may be necessary to carry out the separation of grade as herein provided, also to obstruct or close temporarily any streets, avenue or alleys to

such extent and for such length of time as may be reasonably necessary; also make temporary changes in its tracks at the present street grade crossings and construct and maintain temporary structures and falsework in the streets, avenues and alleys, subject to the approval of the commissioner of public works.

Section 13. All water pipes, sewers and other utilities owned by the city, including all service connections necessary with the abutting property, shall be moved to the position made necessary by the change of grade in streets, avenues and alleys under this ordinance by the city, under the supervision of the commissioner in charge of such utilities at such a time and in such manner as will interfere as little as possible with the work being carried on by the railway company.

The cost and expense of changes in position of utilities owned by the city, made necessary by the change of gradient, including the replacement of such utilities at the proper depth to secure as nearly as may be their former state of usefulness, shall be borne by the railway company, and the cost shall be paid into the city treasury monthly upon the rendering to the railway company by the proper department of the city, bills for the expense incurred in this work during the previous month.

All work upon the streets, avenues, and alleys required to be done by the railway company, under this ordinance, shall be performed to the satisfaction of the commissioner of public works.

Section 14. The railway company, by its acceptance of this ordinance, agrees to indemnify and save harm-

less the city from all loss, costs and damages which it may suffer, or which may be recovered against it, on account of damage to persons or property arising out of the performance of any of the work to be done by the railway company, or by the city, under the provisions of this ordinance, including the damage to abutting property resulting from re-establishment of street and including lawful damage resulting from street vacations.

Section 15. The city of Spokane will exercise to the full extent its police and other powers, to require all persons and corporations occupying or using any portions of the public streets, avenues or alleys affected by the provisions of this ordinance to conform, at their own expense, such occupation or use to the grade changes, alignment and structures herein provided for, and to that end to do all the excavating, filling and other work necessary to such conformation, and to require all street railway companies to also repave that portion of such streets between their rails, and where there are two or more tracks, between their tracks, all of such work to be done at such times and in such manner as to cause the minimum amount of interference or hindrance to the work of the railway company, and nothing in this ordinance shall be construed as relieving any person or corporation, so occupying or using such streets, avenues or alleys, from liability to make such changes and do such work at their own sole cost and expense. If it should transpire that the powers of the city are inadequate to that end, then the city will prosecute such condemnation proceedings as may be necessary, and the railway com-

pany shall pay such judgments as may be finally awarded and the costs of such proceedings.

Section 16. The railway company shall bear all the expense of effecting the separation of grades in the manner herein provided, including the damages to abutting property resulting from the changes in the streets, avenues and alleys herein authorized, excepting such expenses as are to be borne by corporations or individuals under the provisions of sections 6 and 15 hereof, and such abuttal damages as are to be borne by the city under the provisions of section 7 hereof, and if suit shall be brought against said city to recover damages on account of said changes, timely notice thereof shall be given the railway company, and it shall have the right to defend the same in the name of the city, and no such suit shall be settled without the consent of the railway company. If it shall become necessary for said city to bring condemnation suits in furtherance of the work to be done under the terms of this ordinance, said city shall bring the same upon request of said railway company, and said railway company shall aid in and have the right to control the prosecution of said suit through counsel selected by it.

Section 17. The city of Spokane undertakes by appropriate proceedings to vacate such portions of any street, avenue or alley as are upon the right of way of the railway company in the district between Sprague avenue and Division street on the east, and Sixth avenue on the west, and across which overhead bridges are not to be constructed by the railway company under the provisions of section 6 hereof, such vacation to be made effective before the tracks are

elevated across the streets, avenues or alleys to be vacated.

Section 18. When the railway company has elevated its tracks in accordance with this ordinance, so that the same are ready for use then and thereupon, all provisions of the ordinances of the city of Spokane having for their purpose the protection of street traffic at grade street crossings, shall cease to be applicable to such railway company as to that portion of its tracks so elevated.

Section 19. Such lighting as may be ordered by the city council to adequately illuminate the streets and sidewalks beneath said bridges shall be provided and maintained by said city at the expense of the railway company. Bills for said lighting shall be paid monthly by the railway company.

Section 20. Said railway company shall begin the work by it to be performed under the terms of this ordinance on or before October 1st, 1912, and thereafter diligently, continuously and in good faith prosecute said work until the separation of grades required by this ordinance is completed, said separation to be completed on or before October 1st, 1915, unless prevented by weather conditions, strike or strikes, or legal proceedings, injunction order, or other process of a court of competent jurisdiction, and said railway company shall give notice in writing, to the corporation counsel of said city, of the institution of legal proceedings or the pendency of any strike or strikes; and said city shall thereupon have the right to intervene in any suit or proceeding and move for a dis-

solution of injunction or restraining order, or for any other proper order, remedy or relief.

Section 21. Nothing in this ordinance contained shall be deemed to be a waiver or surrender of any of the police powers of the city, or be taken in any way to deprive the city of the right to properly exercise such power.

Section 22. All the work done under the provisions of this ordinance by the Northern Pacific Railway Company, by direct employment of labor or by contract, shall be performed on the basis that citizens of Spokane, married men and men of families, shall be given preference in employment; the lists of the city free employment office are at the disposal of said railroad company to this end.

Section 23. The railway company shall accept the terms and conditions of this ordinance within 45 days after its passage, by filing with the city clerk of said city of Spokane a written acceptance of the same, and if not accepted within said time, said ordinance shall be null and void unless further time be expressly given by the city council.

Section, 24. This ordinance shall take effect and be in force 30 days from and after its passage.

Passed the City Council, Feb. 16, 1912.

W. J. HINDLEY, Mayor.

Attest: C. A. FLEMING, City Clerk.

Service of within answer is hereby acknowledged this 5th, day of Feb., 1913.

(Signed) POST, AVERY & HIGGINS,

For Plaintiffs.

Endorsements: Answer to Complaint of Geo. Turner and wife.

Filed February 5, 1913.

W. H. HARE, Clerk.

By F. C. NASH, Deputy.

*In the District Court of the United States, in and for
The Eastern District of Washington.*

H. J. SHINN and PHOEBE SHINN,

Plaintiffs.

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Defendant.

IN EQUITY.

To the Honorable the Judges of the District Court of the United States, in and for the Eastern District of Washington.

H. J. Shinn and Phoebe Shinn, his wife, as plaintiffs, bring this their bill, against the Northern Pacific Railway Company, a corporation, as defendant; and thereupon plaintiffs complain and say:

First: That the plaintiffs are citizens of the State of Washington, residing at Spokane, Spokane County, Washington, in the Eastern District of Washington, and that the defendant, the Northern Pacific Railway Company, named as defendant in the caption, is a corporation duly organized and existing under the laws of the State of Wisconsin, and having its principal place of business in the Eastern District of Wisconsin, and a citizen of the said State, and an inhabitant of the Eastern District of the said State;

and that the amount in controversy in this cause as hereinafter shown is of more than three thousand dollars in value, exclusive of interest and costs.

Second: That plaintiffs are husband and wife, and that all the property and property rights of either of them in the State of Washington, including the real property hereinafter described, is held by them and belongs to them as a community under the laws of the State of Washington.

Third: That on, to-wit, the 20th day of January, A. D. 1881, the Northern Pacific Railroad Company, a corporation, was the owner in fee and in possession of the following described tract of land to-wit: The north half of Section Nineteen (19), Township twenty-five (25) North, Range forty-three (43) East of the Willamette Meridian, lying and being in Spokane County, in the then territory (now State) of Washington; that the said tract of land abutted, on the south, the town of Spokane Falls, then having a population of not to exceed three hundred people; that on said date, the said Northern Pacific Railroad Company duly made and executed and filed and recorded in the office of the Auditor of Spokane County, in said Territory, a town plat of an addition to the said town of Spokane Falls, called Railroad Addition to Spokane Falls, which said addition was laid out upon and occupied the greater part of the tract of land above described, upon which said plat was shown lots and blocks and streets and alleys, with figures and explanatory notes showing the size of the said lots and blocks, and the width of the streets and alleys, and with the names of the several streets plainly in-

dedicated in writing thereon, and which said plat contained a writing, duly made and executed by and on behalf of said Northern Pacific Railroad Company dedicating the streets and alleys shown on said plat to the use of the public. A copy of the said town plat is hereunto attached, and made a part of this bill of complaint and marked "Plaintiff Exhibit A."

Fourth: That in and upon the said town plat, and extending from Washington Street on the east to Adams street on the west, a street two hundred twenty-five and seven-tenths (225.7) feet wide, was marked and indicated and named and called "Railroad Street," which said street was in and by the said plat and the dedicatory writing attached thereto, and was intended by the said Northern Pacific Railroad Company to be dedicated to the use of the public as a street with a reservation in the said Railroad Company of the right to use and employ the surface of the said street for the railway tracks and other uses of the said Railroad Company, as indicated on said plat, which were to-wit: a single line of track located in approximately the center of said Railroad Street and extending throughout its entire length, with two switch tracks, one on each side of the main track, extending from Post Street on the east to Monroe Street on the west, and with a depot building on the north side of the northerly switch track, and abutting thereon. And plaintiffs allege that from the time of the filing of said town plat as aforesaid, Railroad Street became a public street and that it has ever since remained and now is a public street.

Fifth: That thereupon, and immediately there-

after, the said Northern Pacific Railroad Company put upon the market and proceeded to sell and dispose of to the public, for a consideration in money, the lots and blocks marked and described on the said town plat, and that prior to the year 1889 it had sold to individuals, and conveyed by deeds with the usual covenants of warranty, all or nearly all the lots and blocks shown on the said town plat as abutting on Railroad Street, describing the same in the said deeds by reference to the plat filed as aforesaid, and that on, to-wit, August 21, 1888, it sold to plaintiffs' grantor, and conveyed to him by deed with the usual covenants of warranty, lots five (5) and six (6), in block twenty-nine (29) of said Railroad Addition, describing the same in the said deed solely by reference to the said town plat, and plaintiffs by mesne conveyances from the grantee of the said Railroad Company, are now the owners in fee of said lots Five and Six, Block Twenty-nine of said Railroad Addition; said lots abut on Railroad Street, and plaintiffs have erected buildings on said lots and abutting on said Railroad Street at a cost to them of approximately Forty Thousand Dollars, which said buildings are now standing intact and in use as warehouses.

Sixth: That immediately after the filing and recording of the said town plat, Railroad Street was thrown open to public use as a street by the said Northern Pacific Railroad Company, and was used and employed as a street by the public, with the knowledge and consent of the said Railroad Company, for more than ten years, during which time it sold to individual members of the public the lots abutting

on said street, and during which time individuals and corporations owning lots abutting on said street, constructed residence and business buildings fronting on said street, which were served for purposes of ingress and egress and light and air, and all other street purposes, by said Railroad Street, all with the knowledge and consent and the procurement and acquiescence of the said Northern Pacific Railroad Company. In the year 1889 a great fire destroyed all the business part of the then town of Spokane Falls, including all buildings abutting on Railroad Street in the said Railroad Addition, and at the time of the said fire, Railroad Street was one of the principal streets of the said town, built up almost solidly with residences and business buildings, most of them fronting on said Railroad Street, and served by the said street. All of the said buildings then standing on the south side of Railroad Street, except buildings on corner lots, had no other means of access than by and through Railroad Street, and the plaintiffs allege that if for any reason the act of the said Railroad Company in filing and recording the said town plat was ineffective to dedicate Railroad Street as a street, under the laws of the Territory of Washington, relating to the making and recording of town plats, that the intention and purpose of said Railroad Company, as aforesaid, to open said Railroad Street as a street following by the opening of the same, and the acceptance and user of the same by the public as a street as aforesaid, constituted a common law dedication of the said street to the use of the public.

Seventh: That the defendant, the Northern Pacific Railway Company, is now the owner and in possession of all the property and property rights, corporeal or incorporeal, of the said Northern Pacific Railroad Company, having succeeded to them in the year 1896 by purchase at a Judicial sale of the said property and property rights, and is engaged in operating the line of railway formerly owned and operated by the last named company from Lake Superior to Puget Sound, which said line of railway passes through the City of Spokane (formerly the town of Spokane Falls) on the surface of Railroad Street in the said city.

Eighth: That at the time of the dedication of Railroad Street, as plaintiffs are informed and believe, and on such information and belief allege, it was not believed or intended by the said Northern Pacific Railroad Company that the said town would or should grow to any appreciable extent, and it was believed that the uses and purpose reserved to the said Railroad Company, and shown on the town plat of its addition to Spokane Falls, would at all times be sufficient for the purposes of its business, and plaintiffs allege that the uses and purposes so shown on the said town plat were the only uses and purposes intended to be reserved by it, and the only uses and purposes that were in fact and in law reserved by it in its plat dedicating to the public the streets and alleys of Railroad Addition to Spokane Falls. Since the filing and recording of said town plat the name of the town of Spokane Falls has been changed to that of the City of Spokane, and the population of the City of Spokane

has grown to approximately one hundred and twenty-five thousand people, and all or nearly all of the lots and blocks of Railroad Addition, including those abutting on Railroad Street, are in private ownership, and have been improved by the erection of business buildings costing in the aggregate many millions of dollars. From the year 1881 to the year 1896 the said Railroad Street was used and employed by the said Northern Pacific Railroad Company for certain of its tracks laid upon the surface of the street, and for a small depot building in the center of the street, but not otherwise, and since the year 1896 the said street has been used and employed by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, for the use of its tracks upon the surface of said street, but not otherwise; and all lots and blocks in Railroad Addition, and the lots and blocks in said addition abutting on Railroad Street in particular, would be seriously injured and damaged by any further uses of said Railroad Street than that reserved in the dedication of Railroad Addition, and that to which it has been put for now more than thirty years, and particularly by any structure placed in the said street which will close the same to the public or impair the full use of the same as a street by the public and the abutting owners; yet notwithstanding that fact, and in violation of the rights of the owners of lots abutting on Railroad Street, the defendant, the Northern Pacific Railway Company, has threatened to and is now about to proceed to build and erect in said Railroad Street, extending its entire length through Railroad

Addition, a dirt fill or embankment, secured by retaining walls of concrete or stone masonry, approximately fifteen feet high, and occupying the said street for a width of eighty-five feet, for the purpose of carrying its tracks at an elevation instead of upon the surface of said street as at present, which said dirt fill or embankment will destroy Railroad Street, or seriously impair its use and enjoyment by the public, and by the abutting lot owners, for purposes of access and light and air, and other beneficial use and enjoyment of their property, and in addition when the said structure is built and trains are operated on it, the trains will cast upon abutting properties, and upon other property in the vicinity, dirt, dust, cinders, smoke, deleterious gases, and other poisonous deleterious and offensive substances, and will cause great access of noise and of jarring from the operation of trains, to such an extent as to seriously interfere with the enjoyment of the real property in the vicinity, and to render the improvements on said property unfit for residence or business purposes, all to the greatly increased detriment of abutting owners, and to the diminution in value of the abutting properties. The said dirt fill or embankment in its passage by and in front of the real property of plaintiffs before described will so occupy Railroad Street that there will remain only ten feet between the Railroad Street front of plaintiffs' property and the south retaining wall of the said dirt fill or embankment, thus preventing access to the buildings on said property by and through Railroad Street and cutting off from and depriving said property of light and air by and through Rail-

road Street, and rendering the said property peculiarly and exceptionally liable to all the injurious results from the operation of trains over the said elevated structure hereinbefore alleged. The diminution in value to the abutting lots of plaintiffs and the buildings erected thereon, if the said elevated structure in Railroad Street be built, and maintained, will be more than Ninety-five Thousand Dollars, and plaintiffs will be damaged to that extent.

Ninth: That it is contemplated and intended by the defendant, as plaintiffs are informed and believe, and on such information and belief allege, when the said elevated structure shall be built and tracks laid thereon, to receive and transport on the said tracks through the City of Spokane, the freight traffic, both of its own and of other transcontinental railroad lines, both east and west bound traffic, and that the said elevated structure is to be built for that purpose, and for none other; that the operation of heavy freight trains over the said structure will be so continuous or at such short intervals, and the said trains will cause such noise and produce such jarring and will cast such quantities of dirt, dust, cinders, smoke, and deleterious gases, that the same will impair the enjoyment and impair the value of all real property situated on or in the vicinity of said Railroad Street; that Railroad Street extends east and west through the heart of the business centre of the City of Spokane, and some of the most valuable business property in the said city, with the most valuable improvements thereon, lies and abuts upon each side of said Railroad Street, and plaintiffs allege that, situated

as it will be, and used for the purpose contemplated, the said elevated structure will be a nuisance per se and without reference to its situation and character as an unlawful obstruction of Railroad Street.

Tenth: That the defendant pretends to be acting under the duress and compulsion of a mandatory ordinance of the City of Spokane, requiring it to elevate its tracks on Railroad Street so that the same will pass over the cross streets at a sufficient height to permit traffic on the cross streets to pass thereunder without hindrance; that while it is true that the said ordinance professes to order and require the defendant to separate its grade from that of the street grades by elevating the plane of its tracks, the said ordinance contains the following controlling provision: "Section 23. The Railway Company shall accept the terms and conditions of this ordinance within forty-five days after its passage, by filing with the City Clerk of said City of Spokane a written acceptance of the same, and if not accepted within said time, said ordinance shall be null and void unless further time be expressly given by the City Council." Said ordinance was drafted and presented to the City Council by the defendant, and its passage was solicited by the defendant, which has solicited a similar ordinance from the City Council for many years, but had always been defeated in its efforts to have such an ordinance passed by the protest of the citizens and property owners of the City of Spokane. The purpose of the defendant in seeking the passage of said ordinance was to improve the grade of its railway through the City of Spokane, so that it might with greater ease and less cost, haul

its own east and west bound freight traffic, and that of other transcontinental railroads through the City of Spokane, and no consideration of the public health or safety actuated it in seeking the passage of the ordinance, nor, as plaintiffs verily believe, actuated the Council of the City of Spokane in the passage of the said ordinance; and plaintiffs allege that the passage of the said ordinance in the guise of a mandatory ordinance, when it was in truth merely a permissive ordinance, was a lawless and arbitrary exercise of power on the part of the City Council, instigated by the defendant, for the purpose of destroying or curtailing the rights of owners of property abutting on Railroad Street, in opposing the building of the elevated structure in Railroad Street, or failing that, in securing adequate damages for injuries inflicted on their property by the building of said structure.

Plaintiffs allege that the said ordinance is absolutely void because the subject matter of the same is, by the laws of the State of Washington, committed to the exclusive jurisdiction of another and different agency of the State, to-wit, the Public Service Commission of the State, and because the said ordinance undertakes to authorize, without authority in the City Council to so authorize, an obstruction of one of the public streets of the City of Spokane, and that it is also void as an attempt on the part of the Council of the City of Spokane to authorize the maintenance and operation of the defendant's railroad through the City of Spokane in a manner that will constitute the same a public nuisance irrespective of its effect as an obstruction of Railroad Street, and plaintiffs allege further

that if the said ordinance be valid, it confers no authority on the said defendant to obstruct Railroad Street in the manner aforesaid and for the purpose aforesaid, without first having had ascertained and determined in the manner provided by law, the extent of the loss and injury inflicted on real property abutting on said Railroad Street by the structure aforesaid, and without first paying to the owners of such abutting property the loss and injury so found and ascertained. But the said defendant pretends that the ordinance of the City of Spokane before referred to, authorizes it to erect and maintain the said structure and to operate its line of railway thereon, without regard to the injurious effects of the same on the abutting owners, and without making to them compensation for the injurious effects thereof upon their abutting property, and it denies that they are entitled to compensation in the premises, and the said defendant will, pursuant to the pretended authority of the ordinance aforesaid, proceed to erect and build the said structure and to maintain the same, and to operate its freight and passenger trains over the same, unless restrained by the injunction of this Honorable Court.

Eleventh: All of which actings, doings, and pretenses of the said defendant, are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of the plaintiffs in the premises. In consideration whereof, and forasmuch as the plaintiffs are remediless in the premises, at and by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiffs pray:

First. That a writ of subpoena issue against the defendant, the Northern Pacific Railway Company, requiring it to appear in this court and answer this bill of complaint, but without oath, all answers under oath being hereby expressly waived, and to stand and abide such orders and decrees as the court may from time to time make, adjudge and enter in the premises.

Second: That pending the final determination of the subject matter hereof, a preliminary injunction issue restraining the said defendant from constructing, building, or maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that on final hearing the court render a decree perpetually enjoining and restraining the defendant from constructing, building and maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that if, pending the final hearing, the defendant shall have constructed and built such structure in Railroad Street, in whole or in part, that the court, as part of its final decree, issue a mandatory injunction requiring and compelling the defendant to remove the said structure from Railroad Street and to restore the said street to the condition in which it was before the building and erection of said structure.

Third: That if for any cause the court shall consider that the defendant is entitled to build and erect said structure in Railroad street, that this cause be retained and that the court issue a perpetual injunction enjoining and restraining the defendant from building, erecting and maintaining the said structure,

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ST.

34

d on map 50 x 155 ft

50 x 148 ft

as marked on map

First. That a writ of subpoena issue against the defendant, the Northern Pacific Railway Company, requiring it to appear in this court and answer this bill of complaint, but without oath, all answers under oath being hereby expressly waived, and to stand and abide such orders and decrees as the court may from time to time make, adjudge and enter in the premises.

Second: That pending the final determination of the subject matter hereof, a preliminary injunction issue restraining the said defendant from constructing, building, or maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that on final hearing the court render a decree perpetually enjoining and restraining the defendant from constructing, building and maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that if, pending the final hearing, the defendant shall have constructed and built such structure in Railroad Street, in whole or in part, that the court, as part of its final decree, issue a mandatory injunction requiring and compelling the defendant to remove the said structure from Railroad Street and to restore the said street to the condition in which it was before the building and erection of said structure.

Third: That if for any cause the court shall consider that the defendant is entitled to build and erect said structure in Railroad street, that this cause be retained and that the court issue a perpetual injunction enjoining and restraining the defendant from building, erecting and maintaining the said structure,

TOWN PLAT

- 95 -

RAILROAD ADDITION

Spokane Falls.

Whereas the Board of Commissioners of the City of Spokane Falls, Washington, do hereby certify that the following is a true and correct copy of the original of the same as the same is on file in the office of the City Clerk of said City of Spokane Falls, Washington, to-wit:

The original of the same is on file in the office of the City Clerk of said City of Spokane Falls, Washington, to-wit:

City of Spokane Falls,
Washington.

That the said Board of Commissioners of the City of Spokane Falls, Washington, do hereby certify that the following is a true and correct copy of the original of the same as the same is on file in the office of the City Clerk of said City of Spokane Falls, Washington, to-wit:

The original of the same is on file in the office of the City Clerk of said City of Spokane Falls, Washington, to-wit:

J. E. Cooper,
Notary Public
Washington.

The said Board of Commissioners of the City of Spokane Falls, Washington, do hereby certify that the following is a true and correct copy of the original of the same as the same is on file in the office of the City Clerk of said City of Spokane Falls, Washington, to-wit:

J. E. Cooper,
Notary Public
Washington.



as alleged in the complaint, until it shall have caused to be ascertained and paid, in the manner provided by the constitution and laws of the State of Washington, compensation for the property of the plaintiffs taken and damaged by the building, erection and maintenance of said structure as aforesaid.

Fourth: And for such other and further relief as to the court shall seem meet and equitable.

TURNER & GERAGHTY.

POST, AVERY & HIGGINS.

Solicitors for Complainant.

State of Washington,
County of Spokane.—ss.

Before me, the undersigned Notary Public, in and for the State and County aforesaid, personally appeared H. J. Shinn, one of the above named plaintiffs, who, on being duly sworn, deposes and says; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters stated on information and belief, and as to those matters he believes it to be true.

(Signed) H. J. SHINN.

Subscribed and sworn to before me this 6th day of January, 1913.

(Seal)

(Signed) J. M. GERAGHTY,
Notary Public.

Endorsements: Bill of Complaint of H. J. Shinn,
et ux.

Filed January 7, 1913.

W. H. HARE, Clerk.
By F. C. NASH, Deputy.

122 *H. A. & L. D. Holland Co., et al., vs.*

*In the District Court of the United States, in and for
the Eastern District of Washington,
Northern Division.*

H. J. SHINN AND PHOEBE SHINN,

Plaintiffs.

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Defendant.

No. 1582.

IN EQUITY.

The answer of The Northern Pacific Railway Company, defendant, to the complaint of H. J. Shinn and Phoebe Shinn:

This defendant answers and says:

1. Admits that plaintiffs are citizens of the State of Washington, residing in the Eastern District of Washington, and that the defendant is a corporation organized and existing under the laws of the State of Wisconsin, and a citizen and resident of such state; admits that the amount in controversy in this cause is more than three thousand dollars in value, exclusive of interest and costs.

2. Admits that plaintiffs are husband and wife, but states that it has no knowledge with respect to whether all the property of the plaintiffs, including the real property in the bill of complaint described, does or does not belong to them, as a community, under the laws of the State of Washington.

3. Admits that on to-wit: January 20, 1881, the Northern Pacific Railroad Company owned in fee the north one-half (N 1-2) of section nineteen (19), town-

ship twenty-five (25), north, range forty-three (43), E. W. M., in Spokane County; admits that said tract of land abutted on the south the town of Spokane Falls, which then had a population of not to exceed three hundred people; admits that on, to-wit; January 20, 1881, said Northern Pacific Railroad Company made, executed, and filed in the office of the County Auditor of Spokane County a town plat of an addition to said town of Spokane Falls called "Railroad Addition to Spokane Falls," and that said addition was laid out upon and occupied a portion of the tract of land heretofore described; admits that upon such plat was shown lots, blocks, streets, and alleys and the names of the streets and the width of the streets and alleys; and admits that the paper attached to the bill of complaint, marked "Exhibit A" is substantially a correct copy of such plat. Further answering in respect to said town plat, defendant says that the dedicatory writing on the paper whereon said plat is delineated, signed by John W. Sprague, and to which is attached a certificate of his acknowledgment thereto before one E. E. Cooper, a Notary Public, under date of December 8, 1880, contained an exception from the dedication of the marked streets on said plat of that strip of land 225.7 feet in width, designated as Railroad Street, and that such exception from the dedication is to be read in connection with the dedication and in connection with and as a part of the whole plat, and each and every part thereof.

Further answering the averments of the bill in respect to the ownership of the real estate occupied by said town plat, defendant says:

The Northern Pacific Railroad Company acquired title to a strip four hundred feet in width across said land, to-wit: two hundred feet in width on each side of the center of its main track as marked and shown on said town plat under the designation in "Railroad Street" for the right of way for its railroad, which said right of way was granted to it by the second section of the Act of Congress approved July 2, 1864, incorporating such company; and that it acquired title to the remainder of said land by section three of said act.

4. Defendant denies that upon said plat a street was marked or indicated as is averred in the fourth paragraph of the bill of complaint, but says that the strip of land referred to therein and marked "Railroad Street" on said plat was and is by said plat and the dedicatory and explanatory writing thereon and a part thereof, excepted from dedication as a street, either in whole or in part; denies that the Northern Pacific Railroad Company in and by said plat or the dedicatory writing attached thereto, or at all, intended to dedicate said strip of land to the use of the public as a street, or at all, or with or without the reservations stated in said bill, and particularly referred to in the fourth paragraph thereof, and denies that from the time of filing said plat, or at all, said strip of land became a public street, and denies that it now is a public street.

Further answering as to the alleged dedication of the strip referred to as Railroad Street, defendant says that the Northern Pacific Railroad Company was wholly without power to dedicate said strip of land, or

any part thereof, as a street, either with or without reservation, or in any other manner to convey or part with title to or easement in the said strip of land granted to it for a right of way, as above alleged. Therefore defendant says if said plat and the writing thereon, or any other matter or thing alleged in the bill of complaint, might or could be considered as a dedication to the public use of the strip of land designated as Railroad Street to the extent alleged in the bill of complaint, or at all, the same was and is wholly void and of no effect whatsoever.

5. Defendant admits that after the filing of said plat the Northern Pacific Railroad Company did put upon the market and sell and dispose of the lots and blocks marked on said plat, and that prior to the year 1889, it had sold and disposed of and conveyed, with the usual covenants of warranty, portions of the lots and blocks shown on the said plat as abutting upon the strip of land designated as Railroad Street, and that in a portion of said deeds it did describe the property conveyed by reference to the said plat; admits that on or about December 14, 1889, it conveyed lots five (5) and six (6) in block twenty-nine (29) of the said Railroad Addition, conveying the same in said deed by reference to the town plat, but defendant states that it has no knowledge as to whether plaintiffs are the owners of said premises in fee, or otherwise, by mesne conveyance from the grantee of said Railroad Company, and that it has no knowledge as to the location of buildings upon such lots, the cost thereof, or their present condition and use.

6. Defendant denies that after the filing of said plat, or at all, the strip of land referred to as Railroad Street was thrown open to the public use as a street by the Northern Pacific Railroad Company, and denies that it was used as a street by the public with the knowledge and consent of the Railroad Company, or at all; denies that individuals and corporations used said street for the purpose of ingress and egress, and for light and air, and for other purposes, with the knowledge and consent of the Railroad Company, or at all; admits the destruction of the business portion of Spokane Falls by fire in 1889, including the buildings near to or abutting upon the strip of land referred to as Railroad Street, but denies that such strip of land was one of the principal streets of the town at that time, or at all, and denies that any building standing or abutting upon such strip of land had no other means of access, and denies that the intention and purpose of said railroad company was to open said strip of land as a street; and denies that the same was accepted by the public as a street, as alleged in the bill of complaint, or at all; and denies that the acts and things mentioned in said bill, and particularly in the sixth paragraph thereof constituted a common law dedication of said street to the use of the public. And further answering the averments of the bill in respect to the use of said strip of land by the public, the defendant says that such use as the public made thereof was permissive only and for the purposes of the Railroad Company in affording conveniences to the public having occasion to do business with it.

7. Defendant admits that it is now the owner and in possession of all the property and property rights of the Northern Pacific Railroad Company, and that it succeeded to the same in the year 1896, by purchase at judicial sale, and that it is engaged in operating the line of railroad formerly owned and operated by the said Railroad Company from Lake Superior to Puget Sound, and admits that its line of railway passes through the City of Spokane on the surface of the strip of ground referred to as "Railroad Street."

8. Defendant states that it has no knowledge or information as to whether or not the Northern Pacific Railroad Company, at the time of the filing of the said plat, believed that the town of Spokane Falls would not grow to any appreciable extent. But it denies that there was in law any reservation to the Railroad Company of any uses or purposes in the strip of land marked as "Railroad Street," but avers that in law and in fact the said strip of land was entirely excluded, both by operation of the law through the words of exception used, and in the intention of the Railroad Company, from dedication as a public street on said plat. Defendant admits that since the filing and recording of the plat the name of the Town of Spokane Falls has been changed to the City of Spokane, and that the population has grown to approximately 125,000 people; admits that a portion of the lots and blocks in Railroad Addition abutting upon the strip of land marked upon said plat as Railroad Street are in private ownership, and that some of them have been improved by the erection of business buildings; admits

that between the years 1881 and 1896 its said right of way on the strip referred to as Railroad Street was used and employed by the said Railroad Company for tracks laid upon the surface thereof, and for a depot building located thereon, but alleges that said strip of land was likewise used for all the needed railroad purposes of said company without let or hindrance from anyone, and solely because such strip of land was regarded by the Railroad Company and by all other corporations and persons as its private property, title to which in fee was owned by it; admits that since the year 1896, the said strip of land has been used and employed by this defendant for the use of its tracks upon the surface of said strip of land, but denies that said strip of land has not been otherwise used by it, but says, on the contrary, that it has at all times used and employed said strip of land, and so much thereof as it desired, for its own private uses and purposes, to the exclusion of every other person or corporation, save such as it may have permitted to use the strip of land for its convenience in the transaction of its business; denies that the lots and blocks in Railroad Addition in general and the lots and blocks in said addition abutting upon said strip of land in particular, would be seriously injured and damaged, or at all, by the use of said strip of land for further additional railroad purposes, and for the construction of the elevated tracks thereon, as proposed by the defendant under the ordinance referred to in the bill of complaint, but says, on the contrary, that all such lots and blocks would be benefited by such change of grade and the operation of defendant's tracks over said strip

of land on an elevated grade; admits that it is about to proceed to build and erect on the strip of land referred to as Railroad Street a dirt fill, secured by retaining walls of concrete and stone masonry, approximately fifteen feet high, and occupying the strip for a width of about eighty-five feet, for the purpose of carrying its tracks at an elevation, instead of upon the surface of the strip as at present; but denies that said dirt fill will destroy such strip of land, or in any way impair its use and enjoyment by the public, or by the abutting lot owners for any purpose to which either the public or such abutting lot owners have any right to use it; denies that it will interfere with access of light or air, or any other beneficial use and enjoyment of their property by any abutting lot owners or any other person; denies that the trains which will be operated over the fill when completed will cast upon abutting properties, or upon other property in the vicinity, any dust, dirt, cinders, smoke, deleterious gases, or other poisonous, deleterious or offensive substances, in any other manner, or to any greater or different extent than is now caused by the operation of railroad trains along and upon such strip of land; denies that the operation of railroad trains over such fill will cause great or any increase of noise and of jarring from the operation of trains, or that it will at all interfere with the enjoyment of real property in the vicinity, or render the improvements on such property unfit for residence or business purposes, and denies that any such use of the strip will be to the detriment in any particular of the abutting owners, or operate to diminish in value abutting properties; admits that such fill will

so occupy said strip that only about ten feet will intervene between that part of plaintiff's property which abuts upon the strip of land referred to as Railroad Street and the south retaining wall of such fill, but denies that access to the buildings on such property by and through such strip of land will be prevented; and denies that the erection of the fill will cut off or deprive such property of light or air by and through such strip of land, and denies that such property is peculiarly or exceptionally liable to any injurious results from the operation of trains over such fill; and denies that such property, or the buildings located thereon, will be diminished in value in the sum of \$95,000, or at all, by the construction of the fill on said strip of land, as alleged, and denies that plaintiffs will be damaged by the construction of such fill in the sum of \$95,000, or in any other sum whatsoever.

9. Defendant admits that when the fill shall have been constructed upon such strip of land as aforesaid and tracks shall have been laid thereon, that it will receive and transport on such tracks through the City of Spokane the freight traffic of its own and other transcontinental railroad lines, both east and west bound, and avers that such tracks are intended for the transporting of both freight and passenger business; it denies that the operation of trains over such structure will be continuous, or at short intervals, and denies that such trains operating thereover will cause noise, produce jarring, and cast quantities of dirt, dust, cinders, smoke and deleterious gases that will impair the enjoyment and the value of all real property situated on or in the vicinity of the strip of land referred to as

Railroad Street; admits that the strip of land referred to as Railroad Street extends east and west through the heart of the business center of the City of Spokane, and that some of the most valuable business property in the city, with valuable improvements thereon, lies and abuts upon each side of such street, but denies that the fill to be erected thereon and used as it is intended to be used will be a nuisance per se, or at all, or an unlawful or any other obstruction of such strip of land.

10. Defendant admits that it is acting in part under the duress and compulsion of an ordinance of the City of Spokane requiring it to elevate its tracks through the city so that traffic upon the city streets shall pass over its right of way and tracks otherwise than at grade, but alleges that in the elevation of its tracks and the change of grade of the strip of land referred to as Railroad Street, it acted also in the exercise of its inherent right and power to make such changes thereon as might be necessary for the proper operation of its railroad system, and that under and by virtue of the grant of Congress to its predecessor in interest, the Northern Pacific Railroad Company, of the right of way in which is included the strip of land referred to herein as Railroad Street, it had the power, and it was its duty, at any time to make such changes in the grade thereof as should be required in the proper operation of its railroad line, and it avers that the change of grade which it proposes to make is required for the proper operation of its railroad lines, and that it is essential to the discharge of its duties to the public that such changes be made, and no act of the Northern Pacific Railroad Company, or this defendant,

could or did disable it from exercising its power to make such changes in the grade of its line as should be necessary in the operation of its railroad system. Defendant admits that the ordinance of the City of Spokane referred to contained the section that is quoted in the tenth paragraph of the complaint; admits that an ordinance was drafted by defendant and presented to the city council, and its passage was solicited by defendant; admits that it has for some time sought the passage of an ordinance relating to the abolition of grade crossings, but denies that the ordinance which was adopted was drafted or presented to the city council by defendant, or that its passage was solicited by defendant, or that it has solicited a similar ordinance from the city council for many years, or at all, and that it has been defeated in its efforts to have such an ordinance passed by the protests of property owners of the City of Spokane. Defendant denies that in endeavoring to secure the abolition of grade crossings, its purpose was to improve the grade of its railway through the City of Spokane; denies that no consideration of the public health or safety actuated it in seeking the passage of an ordinance having that purpose; denies that no consideration of the public health or safety actuated the city council in the passage of the ordinance in question; denies that the enactment of the ordinance was a lawless and arbitrary exercise of power on the part of the city council; denies that it was instigated by defendant; denies that such ordinance was other than it appears to be upon its face; denies that its adoption was for the purpose of destroying or curtailing the rights of

abutting property owners to oppose the building of the proposed fill upon the strip of land marked Railroad Street, and denies that it was for the purpose of preventing such property owners from securing adequate damages for injuries inflicted to their property by the building of the structure; defendant also denies that the ordinance is void because the subject matter of the same is by the laws of the state committed to the jurisdiction of the Public Service Commission of the state, but avers that if it be the law that the Public Service Commission of Washington is, under the statutes of that state, alone empowered to compel the separation of grade crossings, that fact is utterly immaterial in the case in hand. The City of Spokane has by the ordinance in question provided for the change of the grade of its streets, a matter of which it has exclusive jurisdiction, and as a part of the plan for the change of such streets, as proposed by such ordinance, it is essential that the defendant change the grade of its right of way and tracks as proposed in such ordinance. The defendant is not opposing such change, but has consented thereto, and even if it be that the Public Service Commission alone has power to compel a change of grade over the protests of a Railroad Company, there is nothing in that rule which forbids a city to change the grade of its streets and a railroad company, such as defendant, to make such changes in the grade of its tracks as will permit the city's plans for grade change to be effectual. Defendant denies that the ordinance in question is void because it undertakes to authorize an obstruction of one of the public streets of the City of Spokane; denies

that it is void because it is an attempt to authorize the maintenance and operation of the defendant's railroad through the city in such a manner as will constitute a public nuisance. Defendant denies that such ordinance confers no authority on defendant to make the change in the grade of the strip of land referred to as Railroad Street without first having had ascertained and determined the amount of loss and injury inflicted on real property abutting upon such strip by the change therein, and without first paying to the owners of such abutting property the loss and injury so caused. Defendant admits that it claims that the ordinance in question authorizes it to erect and maintain the fill along such strip as proposed, and to operate its line of railway thereon without regard to the injurious effects, if any there are, resulting to the abutting owners, and without making to them compensation for the injurious effects, if any there are, upon their property; admits that it denies that the property owners along said strip of land are entitled to compensation because of the change in grade thereon, and admits that it will, pursuant to the authority of the ordinance aforesaid, and in the exercise of its inherent power to make such changes in its own property as shall be necessary for the proper operation of its railroad lines, proceed to construct the fill contemplated by the ordinance along the strip of land aforesaid, and will maintain the same thereon, and will operate its freight and passenger trains over the same, unless restrained by the injunction of this court.

Further answering with respect to the ordinance referred to in the bill of complaint and particularly with

respect to the matters and things set forth in the tenth paragraph of such complaint, defendant alleges that its railroad lines, over which are operated numerous trans-continental trains for the carriage of passengers and freight, extend at grade across the whole of the City of Spokane, being a distance of four or five miles, and that many of the streets of the City of Spokane cross its tracks at grade. Where its right of way and tracks run through Railroad Addition over the strip of land referred to as Railroad Street, it is operating in the heart of the business section of Spokane; wholesale houses in all lines of business have been located along its tracks and abutting thereupon are large warehouses where goods are received from and shipped out over its lines of railway. These warehouses are for the principal part constructed upon the strip of land referred to as Railroad Street by virtue of permission so to do granted by defendant. In addition to its through freight and passenger trains and many local freight and passenger trains which pass over its tracks through such railroad addition over the strip of land referred to as Railroad Street, the defendant operates thereover many switching trains engaged in the handling of goods from and to the warehouses aforesaid, and the same thing is true along its right of way on both sides of the said Railroad Addition for a distance of a mile or more. The principal part of the business section of the City of Spokane lies to the north of defendant's right of way where it runs through the city, but a considerable business section lies to the south of its tracks, and more than one-half of the residence section of the city lies to the

south of its tracks. In consequence of the location of its right of way through the heart of the city almost equally dividing the population thereof, the traffic across its right of way over the public streets of the city has become very heavy and is growing greater each year. Street railway lines are laid upon many of the city's streets crossing the defendant's right of way, and street cars are continually passing thereover. So great has the volume of business become that there is ever and imminent danger arising from the crossing of defendant's tracks at grade, not only to those who cross its tracks by a street car or other vehicle, or on foot, but to the passengers upon defendant's trains, and the operation of defendant's railroad system through the City of Spokane has been much hindered and impeded, and has been rendered much less efficient than it would be if there were a separation of grades, and in a few years, with the increasing growth of the city, it will become almost impossible to efficiently operate its lines through Spokane. The danger and inconvenience, both to the public and to the defendant, arising from the crossing of defendant's tracks by streets at grade, has long been recognized by the people of the City of Spokane, by the city officials, and by the defendant, and it has been the desire of all that such changes might be made in the grades of the city's streets and of the defendant's right of way as should do away with grade crossings. After several years of study, negotiations, and consultation, a plan was arrived at for making changes in the grades of the city's streets and of defendant's right of way, so that a separation of grade between

the right of way and the streets should be accomplished, and to carry out such plan the city council of the City of Spokane, on or about February 16, 1912, duly passed and adopted Ordinance No. C594, a copy of which is attached hereto, marked Exhibit A and is prayed to be read as a part of this answer, such ordinance being the same ordinance which is referred to in the plaintiff's bill of complaint. The plan of grade separation proposed was agreed to by defendant, and it accepted the terms and conditions of the ordinance in writing, as required by the provisions thereof, and defendant ever since has been and is now willing to comply with such ordinance, and to execute the same in all respects, and even though it had not been so willing to comply with its conditions, the ordinance is mandatory in terms and in character, and the City of Spokane could have compelled defendant to comply therewith.

Still further answering with respect to such ordinance, defendant alleges that therein and thereby the City of Spokane undertook to and did provide for the change of the grade of its streets which have heretofore crossed defendant's right of way and tracks at grade, and that under and by virtue of the laws of the State of Washington the City of Spokane was authorized and empowered in its discretion to make such changes in the grade of its streets. Under and by virtue of such ordinance, the City of Spokane is now proceeding to provide for changes in the grade of its streets where they cross the defendant's right of way and tracks, and is proceeding and will proceed to take all steps which are necessary to make the changes in

the grade of its streets contemplated by the ordinance in question. If defendant should in this cause be enjoined from making the change in the grade of its right of way and tracks as provided in such ordinance and as it proposes to do in compliance therewith, the City of Spokane will be prevented from making the change in the grade of its streets which is contemplated by such ordinance, and which it is proceeding to make, for the proposed changes in its streets cannot be made unless, as a part of the plan thereof, the change of grade of defendant's right of way is made as required by such ordinance. To enjoin defendant, therefore, from changing the grade of its right of way and tracks is, in effect, to enjoin the City of Spokane from making the contemplated changes in the grade of its streets and to enjoin the enforcement of a city ordinance, and defendant says that therefore the City of Spokane is a necessary party to this suit to answer with respect to the validity of an ordinance duly adopted by its city council and to defend against any decree the effect of which will be to prevent it from carrying out its schemes of municipal improvement.

11. Defendant denies that anything done or claimed by it with respect to the change of grade in question is contrary to equity or good conscience, and tends to the wrong, injury, or oppression of the plaintiffs, and denies that plaintiffs are remediless in the premises at common law, and can only have relief in a court of equity. It avers, on the contrary, that if it is mistaken with respect to any matter or thing done, or claimed by it hereunder, and plaintiffs are entitled to compensation by way of damages, or otherwise, by

reason of the construction of the fill proposed and the operation of the trains thereover, that then the matter of the compensation to be paid is cognizable by courts of law in proper proceedings brought therefor, and that the same is not subject to the jurisdiction of a court of equity .

All of which matters and things this defendant stands ready to aver and prove as this court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf sustained.

(Signed) CHARLES W. BUNN.

(Signed) EDWARD J. CANNON.

(Signed) GRAVES, KIZER & GRAVES,
Solicitors for Defendant.

EXHIBIT "A."

ORDINANCE NO. C594.

An ordinance requiring the Northern Pacific Railway Company to separate its grade from that of the street grades within a portion of the City of Spokane by elevating the plane of its tracks and by changing the grade of certain of the streets, and affecting certain streets, avenues and alleys of said city.

The City of Spokane does ordain.

Section 1. The Northern Pacific Railway Company is ordered and required to separate its grade from that of the street grades by elevating the plane of its tracks and by changing the grade of certain of the streets, within the portion of the City of Spokane hereinafter set forth, in the manner and upon the conditions hereinafter specified.

Section 2. The district within which said railway company shall effect the separation of its grade from the street grade shall extend from and including Sprague avenue and Division street on the east to and including Sixth avenue on the west and all streets and avenues excepting those to be vacated as hereinafter provided within the limits of said district, shall be crossed at an elevation and in the manner herein provided.

Section 3. As soon as the railway company has completed the separation of grades as herein provided, it shall remove all of its tracks from the present surface of the streets within the district described in Section 2 of this ordinance, and shall not thereafter lay down any tracks across streets at grade within such district, but the railway company may at any time construct, maintain and operate additional tracks across streets within said district in accordance with the specifications in this ordinance contained.

Section 4. Said separation, except at street crossings, and as otherwise in this section provided, shall be accomplished by an embankment of earth or other suitable filling material and in the district extending from Sprague avenue and Division street on the east to Walnut street on the west, said embankment shall be retained by walls of concrete or stone masonry carried up to the subgrade of the roadbed. From the point where the walls terminate at or near Walnut street westerly to Sixth avenue, a substantial iron fence of design satisfactory to the city council, with concrete or masonry posts shall be constructed between the streets and connected at each with the bridge abut-

ments; provided that between Browne street and Washington street such separation may be accomplished by structures of concrete, steel or iron, or a combination of these materials. Such materials may also be used at other places between streets according to plans and specifications to be submitted to and approved by the city council.

Section 5. Said elevated tracks shall be carried across the streets and avenues specified herein upon bridges constructed of iron, steel or concrete, or a combination of these materials, supported at the end upon abutments of concrete or stone masonry, so located that the exposed face of the said abutments shall be parallel to and coincident with or entirely outside the outside limits of the streets or avenues, and supported intermediately by three rows of columns, one of which shall be placed parallel to and within the established curb on each side of the streets, the remaining row shall be so placed that the center of same coincides with the center of the street; the minimum spacing of the columns parallel with the street shall be 13 feet between centers. Said bridges shall have substantial ballasted floors and shall be so constructed and maintained as to prevent water, dirt, oil or other substances from dropping from the elevated structure into the street. Walls and posts of said bridges shall be calcimined, painted or otherwise kept in a sightly and cleanly condition upon order of the city council. The bridge across Washington street shall be supported intermediately by one row of columns so placed that the center of the same coincides with the center of the street. Said bridges shall conform

generally in their essential features to the plan attached and made a part of this ordinance and marked "Northern Pacific Railway Company, Spokane Grade Separation, typical plan for 75-foot street crossing at right angles to tracks."

Section 6. The elevated street crossings herein referred to shall be constructed in accordance with the following conditions and specifications, and the word "grade," as used in said specifications shall be understood to mean in all cases the elevations and rate of grade of the center lines of the streets. These grades and elevations may be varied at the discretion of the commissioner of public works, to the extent necessary, to give proper drainage to all points of the streets affected, to give proper crowning of the roadways and to provide for vertical curves where the algebraic sum of the rates of grades equals or exceeds 3 per cent.

SPRAGUE AVENUE AND DIVISION STREET.

	Sprague Avenue	Division Street
Width, face to face of abutment.....	75 feet	75 feet
Width of roadway.....	51 feet	51 feet
Width of sidewalks	12 feet	12 feet
Minimum vertical clearance.....	14 ft. 6 in.	12 feet

The existing surfaces of Sprague avenue and Division street shall not be depressed below elevation 1921.7 city datum.

From the aforesaid elevation, easterly to an intersection with the present surface of the street, at or near the east side of Hilliard street, the grade of Sprague avenue shall not exceed 3.6 feet in 100 feet. From the aforesaid elevation westerly to an intersection with

the present surface of the street at or near Browne street, the grade of Sprague avenue shall not exceed four (4) tenths foot in 100 feet.

From the aforesaid elevation northerly to an intersection with the present surface of the street at a point near the south side of Riverside avenue, the grade of Division street shall not exceed 1.62 feet in 100 feet.

From the aforesaid elevation southerly to a point approximately 75 feet south of the south line of Sprague avenue, the grade of Division street shall not exceed 3.57 feet in 100 feet, and from the last described point to an intersection with the present surface of the street, at a point near the south line of First avenue, the grade of Division street shall not exceed three and four-tenths (3.4) feet in 100 feet.

From Division street to the west side of Pine street the grade of First avenue shall not exceed 2.21 feet in 100 feet; across Pine street the grade shall be level, and from the east side of Pine street to an intersection with the present surface of the street at or near the west side of Hilliard street, the grade of First avenue shall not exceed 5.27 feet in 100 feet.

From Sprague avenue to the northerly curb line of First avenue the grade of Pine street shall not exceed 4.7 feet in 100 feet; between curb lines of First avenue the grade of Pine street shall not exceed 1.82 feet in 100 feet, and from the southerly curb line of First avenue to the northerly line of Pacific avenue, the grade of Pine street shall not exceed 5.71 feet in 100 feet. From the northerly line of Pacific avenue to an intersection with the present surface of the street at or near the south line of Pacific avenue, the

grade of Pine street shall not exceed 0.66 feet in 100 feet.

The railway company shall grade at a gradient not exceeding 12 feet in 100 feet east and west from Pine street approaches in the alleys in blocks seven (7) and eight (8) of Saunders' Addition to Spokane, and whenever these alleys or either of them are graded or improved any additional cost in the work incurred by reason of the changes in grades of Division and Pine streets, as in this ordinance provided, shall be borne by the railway company.

BROWNE STREET.

Width, face to face abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Browne street shall not be depressed below elevation 19123.3 city datum.

From the aforesaid elevation northerly to an intersection with the present surface of the street at or near the south line of Sprague avenue, the grade of Browne street shall not exceed 1.5 feet in 100 feet.

From the aforesaid elevation southerly to an intersection with the present surface of the street at or near the northerly line of Pacific avenue, the grade of Browne street shall not exceed 4.6 feet in 100 feet.

The railway company shall grade at a gradient not exceeding 12 feet in 100 feet, east from Browne street, an approach in the alley in block 2, First addition to Fourth addition to Railroad Addition to Spokane, and whenever this alley is graded or improved, and ad-

ditional cost in the work incurred by reason of the change in grades of Browne street as in this ordinance provided, shall be borne by the railway company.

WASHINGTON STREET.

Width, face to face abutments_____	74	feet
Width of roadway_____	51	feet
Width of sidewalks_____	11	ft. 6 in.
Minimum vertical clearance_____	18.2	feet

The grade of Washington street shall remain as it now exists.

STEVENS STREET.

Width, face to face abutments_____	75	feet
Width of roadway_____	51	feet
Width of sidewalks_____	12	feet
Minimum vertical clearance_____	12	feet

The grade of Stevens street shall not be depressed below elevation 1918.0 city datum.

The grade of Stevens street shall continue northerly on this elevation to an intersection with the present gradient of Stevens street from First avenue to a point 124.9 feet south of the south line of First avenue extended southerly.

From the aforesaid elevation southerly to an intersection with the present surface of the street, approximately 240 feet north of the northerly line of Second avenue, the grade of Stevens street shall not exceed 3 feet in 100 feet.

HOWARD STREET.

Width, face to face abutments_____	75	feet
Width of roadway_____	51	feet
Width of sidewalks_____	12	feet
Minimum vertical clearance_____	14	ft. 6 in.

The grade of Howard street shall not be depressed below elevation 1914.7 city datum.

The grade of Howard street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 155 feet south of the south line of First avenue.

From the aforesaid elevation southerly to an intersection with the present surface of the street at or near the north line of the alley in Blocks 28 and 29, Railroad Addition to Spokane, the grade of Howard street shall not exceed 2.4 feet in 100 feet.

WALL STREET.

Width, face to face of abutments.....	66 feet
Width of roadway.....	42 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Wall street shall not be depressed below elevation 1916.8 city datum.

The grade of Wall street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 225 feet south of the southerly line of First avenue.

From the aforesaid elevation southerly to an intersection with the present surface of the street at a point approximately 270 feet north of the northerly line of Second avenue, the grade of Wall street shall not exceed 3 feet in 100 feet.

POST STREET.

Width, face to face of abutments.....	66 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Post street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 155.06 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 2.4 feet in 100 feet.

LINCOLN STREET

Width, face to face of abutments-----	75 feet
Width of roadway -----	51 feet
Width of sidewalks -----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Lincoln street shall remain as it now exists, unless the city shall decide to change the grade of same from the south line of First avenue to a point 155.22 feet southerly from the south line of First avenue, before it is necessary for the Northern Pacific to pave that portion of Lincoln street lying between their present right of way limits, in which case the Northern Pacific shall regrade, repave, recurb and re-sidewalk and otherwise improve said Lincoln Street corresponding to the improvements on either side of their right of way from a point 155.22 feet south of the south line of First avenue to a point 300 feet north of the north line of Second avenue, at such grades as the city shall by ordinance establish therefor.

MONROE STREET

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	13 ft. 6 in.

The grade of Monroe street shall be depressed to such an extent that a uniform grade will extend from the present grade of the ground at a point 155.44 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 3.3 feet in 100 feet.

MADISON STREET

Width, face to face of abutments.....	75 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance	12 feet

The grade of Madison street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 155.63 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 3.2 feet in 100 feet.

JEFFERSON STREET

Width, face to face or abutments.....	75 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Jefferson street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 156 feet south from the south line of First avenue to an intersection with the present surface of the

ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid limits shall not exceed 3.3 feet in 100 feet.

ADAMS STREET

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Adams street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 156 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid limits shall not exceed 2.4 feet in 100 feet.

CEDAR STREET

Width, face to face of abutments-----	100 feet
Width of roadway-----	68 feet
Width of sidewalks-----	16 feet
Minimum vertical clearance-----	12 feet

The grade of Cedar street shall remain as it now exists.

WALNUT STREET

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	14 ft. 6 in.

The grade of Walnut street shall not be depressed below elevation 1910.4 city datum.

The grade of Walnut street shall continue northerly

on this elevation to an intersection with the present surface of the street at a point approximately 10 feet south of the northerly line of Pacific avenue produced.

The grade of Walnut street from the aforesaid elevation southerly to an intersection with the present surface of the street at a point approximately 90 feet north of the northerly line of Second avenue, shall not exceed 3 feet in 100 feet.

From Walnut street to a point 100 feet west of the west line of Walnut street, the grade of Pacific avenue shall not exceed 2 feet in 100 feet.

MAPLE STREET and SECOND AVENUE

	Maple Street	Second Avenue
Width between outside supports of bridge -----	75 feet	75 feet
Width of roadway-----	51 feet	51 feet
Width of sidewalks-----	12 feet	12 feet
Minimum vertical clearance----	14 ft. 6 in	12 feet

The grade of Maple street and Second avenue shall not be depressed below elevation 1911.1 city datum.

The grade of Maple street from this elevation northerly to an intersection with the present surface of the street at the southerly line of Pacific avenue, shall not exceed 0.31 feet in 100 feet.

The grade of Maple street from the aforesaid elevation southerly along Maple street to an intersection with the present surface of the street at a point approximately 110 feet south of the southerly line of Second avenue, shall not exceed 3 feet in 100 feet.

The grade of Second avenue from the aforesaid ele-

vation easterly to an intersection with the present surface of the street at a point approximately 95 feet east of the easterly line of Maple street, shall not exceed 3 feet in 100 feet.

The grade of Second avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at a point approximately 185 feet west of the westerly line of Maple street, shall not exceed 3 feet in 100 feet.

THIRD AVENUE

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Third avenue shall not be depressed below elevation 1913.7 city datum.

The grade of Third avenue from this elevation easterly to an intersection with the present surface of the street at or near the east line of Ash street produced, shall not exceed 2.0 feet in 100 feet.

The grade of Third avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at or near the east line of Oak street, shall not exceed 2.6 feet in 100 feet.

From Third avenue to a point 100 feet south of the south line of Third avenue, the grade of Ash street shall not exceed 2 feet in 100 feet.

FOURTH AVENUE

Width, face to face of abutments-----	75 feet
Width of roadway-----	40 feet
Width of sidewalks-----	17.5 feet
Minimum vertical clearance-----	12 feet

Supporting posts instead of being placed at the curb line shall be so placed as to provide for a 51 foot roadway, should the same be constructed in the future.

The grade of Fourth avenue shall not be depressed below elevation 1910.0 city datum.

The grade of Fourth avenue from this elevation easterly to an intersection with the present surface of the street at a point approximately 10 feet east of the west line of Oak street shall not exceed 4 feet in 100 feet.

The grade of Fourth avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at or near the east line of Cannon street, shall not exceed 2.1 feet in 100 feet.

The grade of Elm street northerly from the north line of Fourth avenue to an intersection with the present surface to the street at or near the southerly line of Third avenue shall not exceed 3 feet in 100 feet.

FIFTH AVENUE AND CANNON STREET

Fifth avenue and Cannon street shall be merged into one crossing, by revising their location and be carried under the elevated tracks through a structure of the following dimensions, to be constructed with abutments at right angle to said tracks.

Width, face to face of abutments.....	75 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Fifth avenue and Cannon street shall not be depressed below elevation 1905.0 city datum.

The grade of Cannon street from this elevation northerly for a distance of approximately 35 feet to the southerly line of the intersection of Fifth avenue and Cannon street in their revised location shall not exceed 5 feet in 100 feet; the grade across this intersection shall be level, and from the northerly line of the intersection to an intersection with the present surface of the street at or near the southerly line of Fourth avenue the grade shall not exceed 4.7 feet in 100 feet.

The grade of Cannon street from the aforesaid elevation southerly to an intersection with the present surface of the street, at or near the northerly line of the alley in block 24, Cannon's addition, shall not exceed 1.2 feet in 100 feet.

The grade of Fifth avenue easterly from the aforesaid elevation to an intersection with the present surface of the street at or near the west line of Elm street shall not exceed 2.82 feet in 100 feet. From the intersection of Fifth avenue and Cannon street the grade along Fifth avenue westerly to an intersection with the present surface of the street at or near the east line of Chestnut street shall not exceed 3.1 feet in 100 feet.

The said railway company shall, within six months after the passage and acceptance of this ordinance, procure and dedicate for the purpose of a public street, that portion of block 11, Cannon's addition to said city necessary to widen Fifth avenue and Cannon street in their new location to their present width of 75 feet, and shall also execute such instrument to the city as will vest in said city the perpetual right to

use for street purposes such portions of the right of way of the railroad company as is included within the limits of said Fifth avenue and Cannon street as changed. In case said railway company shall be unable to purchase said property, or any part thereof, at a price deemed by said company to be reasonable, then the same shall be condemned by the city of Spokane for street purposes and the compensation and damages awarded in such proceeding, including court costs and other expenses of litigation that may be incurred therein, shall be paid by said railway company, and said company shall have the right to take part in said condemnation proceedings in behalf of the city by counsel employed by it, and shall have the right to have all witnesses that it may name called to testify in such condemnation proceedings.

SIXTH AVENUE

Width, face to face of abutments-----	60 feet
Width of roadway-----	40 feet
Width of sidewalks-----	10 feet
Minimum vertical clearance-----	12 feet

Sixth avenue shall be opened, graded and improved by the city through an assessment district as provided by law, and the railway company, by its acceptance of this ordinance shall be deemed to have consented to the opening of Sixth avenue across its right of way, and to have waived any claim for compensation therefor, provided it is not required to bear any part of the cost of opening, grading, and otherwise improving said street, other than what it may be legally assessed for such property as it has abutting said Sixth

avenue, after being opened. The bridge shall be constructed by the railway company at its expense.

The surface of the street shall not be established at a higher elevation than elevation 1900.5 city datum, at any point under the elevated structure of the railway company.

Section 7. All damages to property arising from the re-establishment of grades of those portions of Stevens, Post, Lincoln, Monroe, Madison, Jefferson and Adams streets, lying north of the railway company's tracks, as hereinbefore provided, except the property owned by the railway company, shall be paid by the city either directly or by means of an assessment district legally created therefor. The railway company, by its acceptance of this ordinance waives any claim for abuttal damages by reason of the re-establishment of the local improvement assessments imposed, or which might be legally imposed, for the purpose of paying for any abuttal damages resulting from said re-establishment of grades.

Section 8. The city of Spokane undertakes forthwith upon the acceptance of this ordinance, by the necessary proceedings to legally establish the changes in the grades of the streets, avenues and alleys specified in section 6 thereof.

Section 9. All sidewalks and curbs in the streets and avenues where changes of grade are to be made under the provisions of this ordinance, shall be placed at such elevation above the grade of the streets and avenues as the city council may direct.

Section 10. Excepting, as herein otherwise provided, the railway company shall, after it has made

the changes in the grades of the streets, avenues and alleys herein authorized, restore all paving and sidewalks that it may disturb in carrying out the work to as nearly as possible their former condition of usefulness, using the same kind of material, excepting where on account of increase of grades the city council may require the use of a different kind of material, in which event such other material shall be used. When the tracks have been removed from any of the present street surfaces at any crossing where the tracks are to be elevated as herein provided, the railway company shall with reasonable dispatch thereafter, grade, pave, and provide curbs and sidewalks for that portion of the street upon its right of way situated between the existing paving and sidewalks on each side, and in such a manner and with such material as shall conform thereto.

Section 11. The railway company shall provide for the drainage of the several crossing as provided for in this ordinance, by the construction of receiving basins properly located in or immediately adjacent to said crossings, which said receiving basins shall be connected with and discharge their contents into city sewers.

Section 12. The railway company is hereby permitted and authorized to enter upon the streets, avenues and alleys, and make such excavation and do such work, as may be necessary to carry out the separation of grade as herein provided, also to obstruct or close temporarily any streets, avenues or alleys to such extent and for such length or time as may be reasonably necessary; also make temporary changes

in its tracks at the present street grade crossings and construct and maintain temporary structures and falsework in the streets, avenues and alleys, subject to the approval of the commissioner of public works.

Section 13. All water pipes, sewers and other utilities owned by the city, including all service connections necessary with the abutting property, shall be moved to the position made necessary by the change of grade in streets, avenues and alleys under this ordinance by the city, under the supervision of the commissioner in charge of such utilities at such a time and in such manner as will interfere as little as possible with the work being carried on by the railway company.

The cost and expense of changes in position of utilities owned by the city, made necessary by the change of gradient, including the replacement of such utilities at the proper depth to secure as nearly as may be their former state of usefulness, shall be borne by the railway company, and the cost shall be paid into the city treasury monthly upon the rendering to the railway company by the proper department of the city, bills for the expense incurred in this work during the previous month.

All work upon the streets, avenues, and alleys required to be done by the railway company, under this ordinance, shall be performed to the satisfaction of the commissioner of public works.

Section 14. The railway company, by its acceptance of this ordinance, agrees to indemnify and save harmless the city from all loss, costs and damages which it may suffer, or which may be recovered

against it, on account of damage to persons or property arising out of the performance of any of the work to be done by the railway company, or by the city, under the provisions of this ordinance, including the damage to abutting property resulting from re-establishment of street grades, and including lawful damage resulting from street vacations.

Section 15. The city of Spokane will exercise to the full extent its police and other powers, to require all persons and corporations occupying or using any portions of the public streets, avenues or alleys affected by the provisions of this ordinance to conform, at their own expense, such occupation or use to the grade changes, alignment and structures herein provided for, and to that end to do all the excavating, filling and other work necessary to such conformation, and to require all street railway companies to also repave that portion of such streets between their rails, and where there are two or more tracks between their tracks, all of such work to be done at such times and in such manner as to cause the minimum amount of interference or hindrance to the work of the railway company, and nothing in this ordinance shall be construed as relieving any person or corporation, so occupying or using such streets, avenues or alleys, from liability to make such changes and do such work at their own sole cost and expense. If it should transpire that the powers of the city are inadequate to that end, then the city will prosecute such condemnation proceedings as may be necessary, and the railway company shall pay such judgments as may be finally awarded and the costs of such proceedings.

Section 16. The railway company shall bear all the expense of effecting the separation of grades in the manner herein provided, including the damages to abutting property resulting from the changes in the streets, avenues and alleys herein authorized, excepting such expenses as are to be borne by corporations or individuals under the provisions of sections 6 and 15 hereof, and such abuttal damages as are to be borne by the city under the provisions of section 7 hereof, and if suit shall be brought against said city to recover damages on account of said changes, timely notice thereof shall be given the railway company, and it shall have the right to defend the same in the name of the city, and no such suit shall be settled without the consent of the railway company. If it shall become necessary for said city to bring condemnation suits in furtherance of the work to be done under the terms of this ordinance, said city shall bring the same upon request of said railway company, and said railway company shall aid in and have the right to control the prosecution of said suit through counsel selected by it.

Section 17. The city of Spokane undertakes by appropriate proceedings to vacate such portions of any street, avenue or alley as are upon the right of way of the railway company in the district between Sprague avenue and Division street on the east, and Sixth avenue on the west, and across which overhead bridges are not to be constructed by the railway company under the provisions of section 6 hereof, such vacation to be made effective before the tracks are

elevated across the streets, avenues or alleys to be vacated.

Section 18. When the railway company has elevated its tracks in accordance with this ordinance, so that the same are ready for use, then and thereupon, all provisions of the ordinances of the city of Spokane having for their purpose the protection of street traffic at grade street crossings, shall cease to be applicable to such railway company as to that portion of its tracks so elevated.

Section 19. Such lighting as may be ordered by the city council to adequately illuminate the streets and sidewalks beneath said bridges shall be provided and maintained by said city at the expense of the railway company. Bills for said lighting shall be paid monthly by the railway company.

Section 20. Said railway company shall begin the work by it to be performed under the terms of this ordinance on or before October 1st, 1912, and thereafter diligently, continuously and in good faith prosecute said work until the separation of grades required by this ordinance is completed, said separation to be completed on or before October 1st, 1915, unless prevented by weather conditions, strike or strikes, or legal proceedings, injunction order, or other process of a court of competent jurisdiction, and said railway company shall give notice in writing, to the corporation counsel of said city, of the institution of legal proceedings or the pendency of any strike or strikes; and said city shall thereupon have the right to intervene in any suit or proceeding and move for a dissolution of injunction

or restraining order, or for any other proper order, remedy or relief.

Section 21. Nothing in this ordinance contained shall be deemed to be a waiver or surrender of any of the police powers of the city, or be taken in any way to deprive the city of the right to properly exercise such power.

Section 22. All the work done under the provisions of this ordinance by the Northern Pacific Railway company, by direct employment of labor or by contract, shall be performed on the basis that citizens of Spokane, married men and men of families, shall be given preference in employment; the lists of the city free employment office are at the disposal of said railroad company to this end.

Section 23. The railway company shall accept the terms and conditions of this ordinance within 45 days after its passage, by filing with the city clerk of said city of Spokane a written acceptance of the same, and if not accepted within said time, said ordinance shall be null and void unless further time be expressly given by the city council.

Section 24. This ordinance shall take effect and be in force 30 days from and after its passage.

Passed the City Council, Feb. 16, 1912.

W. J. HINDLEY, Mayor.

Attest: C. A. FLEMING, City Clerk.

Service of within answer is hereby acknowledged this 5th day of Feb., 1913.

(Signed) POST, AVERY & HIGGINS,
For Plaintiffs.

Endorsements: Answer of deft. to Bill of Complaint of H. J. SHINN, et ux.

Filed Feb. 5, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States, in and for
the Eastern District of Washington.*

W. H. KIERNAN and CHRISTINE B. KIERNAN,
Plaintiffs,

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Defendant.

IN EQUITY.

To the Honorable the Judges of the District Court of the United States, in and for the Eastern District of Washington.

W. H. Kiernan and Christine B. Kiernan, his wife, as Plaintiffs, bring this their bill, against the Northern Pacific Railway Company, a corporation, as defendant; and thereupon Plaintiffs complain and say:

First: That the Plaintiffs are citizens of the State of Washington, residing at Spokane, Spokane County, Washington, in the Eastern District of Washington, and that the defendant, the Northern Pacific Railway Company, named as defendant in the caption, is a corporation duly organized and existing under the laws of the State of Wisconsin, and having its principal place of business in the Eastern District of Wisconsin, and a citizen of the said State, and an in-

habitant of the Eastern District of the said State; and that the amount in controversy in this cause as hereinafter shown is of more than three thousand dollars in value, exclusive of interest and costs.

Second: That plaintiffs are husband and wife, and that all the property and property rights of either of them in the State of Washington, including the real property hereinafter described, is held by them and belongs to them as a community under the laws of the State of Washington.

Third: That on, to-wit, the 20th day of January, A. D. 1881, the Northern Pacific Railroad Company, a corporation, was the owner in fee and in possession of the following described tract of land to-wit: The North half of Section nineteen (19), Township twenty-five (25) North, Range forty-three (43) East of the Willamette Meridian, lying and being in Spokane County, in the then territory (now State) of Washington; that the said tract of land abutted, on the south, the town of Spokane Falls, then having a population of not to exceed three hundred people; that on said date, the said Northern Pacific Railroad Company duly made and executed and filed and recorded in the office of the Auditor of Spokane County, in said Territory, a town plat of an addition to the said town of Spokane Falls, called Railroad Addition to Spokane Falls, which said addition was laid out upon and occupied the greater part of the tract of land above described, upon which said plat was shown lots and blocks and streets and alleys, with figures and explanatory notes showing the sizes of the said lots and blocks, and the width of the streets and alleys, and

with the names of the several streets plainly indicated in writing thereon, and which said plat contained a writing, duly made and executed by and on behalf of said Northern Pacific Railroad Company, dedicating the streets and alleys shown on said plat to the use of the public. A copy of the said town plat is hereunto attached, and made a part of this bill of complaint and marked "Plaintiff's Exhibit A."

Fourth: That in and upon the said town plat, and extending from Washington Street on the east to Adams Street on the west, a Street two hundred twenty-five and seven tenths (225.7) feet wide, was marked and indicated and named and called "Railroad Street," which said Street was in and by the said plat and the dedicatory writing attached thereto, and was intended by the said Northern Pacific Railroad Company to be dedicated to the use of the public as a Street, with a reservation in the said Railroad Company of the right to use and employ the surface of the said Street for the railway tracks and other uses of the said Railroad Company, as indicated on said plat, which were to-wit: a single line of track located in approximately the center of said Railroad Street and extending throughout its entire length, with two switch tracks, one on each side of the main track, extending from Post Street on the east to Monroe Street on the west, and with a Depot building on the north side of the northerly switch track and abutting thereon. And Plaintiffs allege that from the time of the filing of said town plat as aforesaid, Railroad Street became a public street and that it has ever since remained and now is a public street.

Fifth: That thereupon, and immediately thereafter, the said Northern Pacific Railroad Company put upon the market and proceeded to sell and dispose of to the public, for a consideration in money, the lots and blocks marked and described on the said town plat, and that prior to the year 1889 it had sold to individuals, and conveyed by deeds with the usual covenants of warranty, all or nearly all the lots and blocks shown on the said town plat as abutting on Railroad Street, describing the same in the said deeds by reference to the plat filed as aforesaid, and that on, to-wit. October 5, 1887, it sold to Plaintiff's grantor, and conveyed to him by deed with the usual covenants of warranty, Lot One (1) and west fifteen (15) feet of Lot two (2), Block twenty-seven, of said Railroad Addition, describing the same in the said deed solely by reference to the said town plat, and Plaintiffs by mesne conveyances from the grantee of the said Railroad Company, are now the owners in fee of said Lot one (1) and west fifteen (15) feet of Lot two (2), Block Twenty-seven (27) of said Railroad Addition; said lot abuts on Railroad Street, and Plaintiffs have erected a building on said lot and abutting on said Railroad Street, at a cost to them of approximately Thirty Thousand Dollars (\$30,000.00), which said building is now standing intact and in use for warehouse and general business purposes.

Sixth: That immediately after the filing and recording of the said town plat, Railroad Street was thrown open to public use as a street by the said Northern Pacific Railroad Company, and was used and employed as a street by the public, with the knowledge

and consent of the said Railroad Company, for more than ten years, during which time it sold to individual members of the public the lots abutting on said Street, and during which time individuals and corporations owning lots abutting on said street, constructed residence and business buildings fronting on said street, which were served for purposes of ingress and egress and light and air, and all other street purposes, by said Railroad Street, all with the knowledge and consent and the procurement and acquiescence of the said Northern Pacific Railroad Company. In the year 1889 a great fire destroyed all the business part of the then town of Spokane Falls, including all buildings abutting on Railroad Street in the said Railroad Addition, and at the time of the said fire, Railroad Street was one of the principal streets of the said town, built up almost solidly with residences and business buildings, most of them fronting on said Railroad Street, and served by the said street. All of the said buildings then standing on the south side of Railroad Street, except buildings on corner lots, had no other means of access than by and through Railroad Street, and the plaintiffs allege that if for any reason the act of the said Railroad Company in filing and recording the said town plat was ineffective to dedicate Railroad Street as a Street, under the laws of the Territory of Washington, relating to the making and recording of town plats, that the intention and purpose of said Railroad Company, as aforesaid, to open said Railroad Street as a Street following by the opening of the same, and the acceptance and user of the same by the public as a Street as aforesaid, con-

stituted a common law dedication of the said street to the use of the public.

Seventh: That the defendant, the Northern Pacific Railway Company, is now the owner and in possession of all the property and property rights, corporeal or incorporeal, of the said Northern Pacific Railroad Company, having succeeded to them in the year 1896 by purchase at a Judicial sale of the said property and property rights, and is engaged in operating the line of railway formerly owned and operated by the last named Company from Lake Superior to Puget Sound, which said line of railway passes through the City of Spokane, (formerly the town of Spokane Falls) on the surface of Railroad Street in the said City.

Eighth: That at the time of the dedication of Railroad Street, as Plaintiffs are informed and believe, and on such information and belief allege, it was not believed or intended by the said Northern Pacific Railroad Company that the said town would or should grow to any appreciable extent, and it was believed that the uses and purposes reserved to the said Railroad Company, and shown on the town plat of its addition to Spokane Falls, would at all times be sufficient for the purposes of its business, and Plaintiffs allege that the uses and purposes so shown on the said town plat were the only uses and purposes intended to be reserved by it, and the only uses and purposes that were in fact and in law reserved by it in its plat dedicating to the public the streets and alleys of Railroad Addition to Spokane Falls. Since the filing and recording of said town plat the name of the town of Spokane Falls has been changed

to that of the City of Spokane, and the population of the City of Spokane has grown to approximately one hundred and twenty-five thousand people, and all or nearly all of the lots and blocks of Railroad Addition, including those abutting on Railroad Street, are in private ownership, and have been improved by the erection of business buildings costing in the aggregate many millions of dollars. From the year 1881 to the year 1896 the said Railroad Street was used and employed by the said Northern Pacific Railroad Company for certain of its tracks laid upon the surface of the street, and for a small Depot building in the center of the Street, but not otherwise, and since the year 1896 the said Street has been used and employed by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, for the use of its tracks upon the surface of said street, but not otherwise; and all lots and blocks in Railroad Addition, and the lots and blocks in said addition abutting on Railroad Street in particular, would be seriously injured and damaged by any further uses of said Railroad Street than that reserved in the dedication of Railroad Addition, and that to which it has been put for now more than thirty years, and particularly by any structure placed in the said Street which will close the same to the public or impair the full use of the same as a street by the public and the abutting owners; yet notwithstanding that fact, and in violation of the rights of the owners of lots abutting on Railroad Street, the defendant, the Northern Pacific Railway Company has threatened to and is now about to proceed to build and erect in

said Railroad Street, extending its entire length through Railroad Addition, a dirt fill or embankment, secured by retaining walls of concrete or stone masonry, approximately fifteen feet high, and occupying the said Street for a width of Eighty-five feet, for the purpose of carrying its tracks at an elevation instead of upon the surface of said street as at present, which said dirt fill or embankment will destroy Railroad Street, or seriously impair its use and enjoyment by the public, and by the abutting lot owners, for purposes of access and light and air and other beneficial use and enjoyment of their property, and in addition when the said structure is built and trains are operated on it, the trains will cast upon abutting properties, and upon other property in the vicinity, dirt, dust, cinders, smoke, deleterious gases, and other poisonous deleterious and offensive substances, and will cause great access of noise and of jarring from the operation of trains, to such an extent as to seriously interfere with the enjoyment of the real property in the vicinity, and to render the improvements on said property unfit for residence or business purposes, all to the greatly increased detriment of abutting owners, and to the diminution in value of the abutting properties. The said dirt fill or embankment in its passage by and in front of the real property of Plaintiffs before described, will so occupy Railroad Street that there will remain only twelve feet between the Railroad Street front of Plaintiff's property and the south retaining wall of the said dirt fill or embankment, thus preventing access to the buildings on said property by and through Railroad Street and cutting off from and de-

prising said property of light and air by and through Railroad Street, and rendering the said property peculiarly and exceptionally liable to all the injurious results from the operation of trains over the said elevated structure hereinbefore alleged. The diminution in value to the abutting lots of Plaintiffs and the buildings erected thereon, if the said elevated structure in Railroad Street be built, and maintained, will be more than Fifty Thousand Dollars, and plaintiffs will be damaged to that extent.

Ninth: That it is contemplated and intended by the defendant, as Plaintiffs are informed and believe, and on such information and belief allege, when the said elevated structure shall be built and tracks laid thereon to receive and transport on the said tracks through the City of Spokane, the freight traffic, both of its own and of other transcontinental railroad lines, both east and west bound traffic and that the said elevated structure is to be built for that purpose, and for none other; that the operation of heavy freight trains over the said structure will be so continuous or at such short intervals, and the said trains will cause such noise and produce such jarring and will cast such quantities of dirt, dust, cinders, smoke, and deleterious gases, that the same will impair the enjoyment and impair the value of all real property situated on or in the vicinity of said Railroad Street; that Railroad Street extends east and west through the heart of the business center of the City of Spokane, and some of the most valuable business property in the said city with the most valuable improvements thereon, lies and abuts upon each side of said Railroad Street, and Plaintiffs allege that,

situated as it will be, and used for the purposes contemplated, the said elevated structure will be a nuisance per se and without reference to its situation and character as an unlawful obstruction of Railroad Street.

Tenth: That the defendant pretends to be acting under the duress and compulsion of a mandatory ordinance of the City of Spokane, requiring it to elevate its tracks on Railroad Street so that the same will pass over the cross streets at a sufficient height to permit traffic on the cross streets to pass thereunder without hindrance; that while it is true that the said ordinance professes to order and require the defendant to separate its grade from that of the streets grades by elevating the plane of its tracks, the said ordinance contains the following controlling provision: "Section 23. The Railway Company shall accept the terms and conditions of this ordinance within forty-five days after its passage, by filing with the City Clerk of said City of Spokane a written acceptance of the same, and if not accepted within said time, said ordinance shall be null and void unless further time be expressly given by the City Council." Said ordinance was drafted and presented to the City Council by the defendant, and its passage was solicited by the defendant, which has solicited a similar ordinance from the City Council for many years, but had always been defeated in its efforts to have such an ordinance passed by the protest of the citizens and property owners of the City of Spokane. The purpose of the defendant in seeking the passage of said ordinance was to improve the grade of its railway through the City of Spokane, so that it might with greater ease and less cost, haul its own

east and west bound freight traffic, and that of other transcontinental railroads through the City of Spokane, and no consideration of the public health or safety actuated it in seeking the passage of the ordinance, nor, as plaintiffs verily believe, actuated the Council of the City of Spokane in the passage of the said ordinance; and plaintiffs allege that the passage of the said ordinance in the guise of a mandatory ordinance, when it was in truth merely a permissive ordinance, was a lawless and arbitrary exercise of power on the part of the City Council, instigated by the defendant, for the purpose of destroying or curtailing the rights of owners of property abutting on Railroad Street, in opposing the building of the elevated structure in Railroad Street, or failing that, in securing adequate damages for injuries inflicted on their property by the building of said structure.

Plaintiffs allege that the said ordinance is absolutely void because the subject matter of the same is, by the laws of the State of Washington, committed to the exclusive jurisdiction of another and different agency of the state, to-wit, the Public Service Commission of the state, and because the said ordinance undertakes to authorize, without authority in the City Council to so authorize, an obstruction of one of the public streets of the City of Spokane, and that it is also void as an attempt on the part of the Council of the City of Spokane to authorize the maintenance and operation of the defendant's railroad through the City of Spokane in a manner that will constitute the same a public nuisance irrespective of its effect as an obstruction of Railroad Street, and Plaintiffs allege further that if the said

ordinance be valid, it confers no authority on the said defendant to obstruct Railroad Street in the manner aforesaid and for the purpose aforesaid, without first having had ascertained and determined in the manner provided by law, the extent of the loss and injury inflicted on real property abutting on said Railroad Street by the structure aforesaid, and without first paying to the owners of such abutting property the loss and injury so found and ascertained. But the said defendant pretends that the ordinance of the City of Spokane before referred to, authorizes it to erect and maintain the said structure and to operate its line of railway thereon, without regard to the injurious effects of the same on the abutting owners, and without making to them compensation for the injurious effects thereof upon their abutting property, and it denies that they are entitled to compensation in the premises, and the said defendant will, pursuant to the pretended authority of the ordinance aforesaid, proceed to erect and build the said structure and to maintain the same, and to operate its freight and passenger trains over the same, unless restrained by the injunction of this Honorable Court.

Eleventh: All of which actings, doings, and pretenses of the said defendant, are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of the plaintiffs in the premises. In consideration whereof, and for as much as the plaintiffs are remediless in the premises, at and by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiffs pray:

First. That a writ of subpoena issue against the defendant, the Northern Pacific Railway Company, requiring it to appear in this court and answer this bill of complaint, but without oath, all answers under oath being hereby expressly waived, and to stand and abide such orders and decrees as the court may from time to time make, adjudge and enter in the premises.

Second: That pending the final determination of the subject matter hereof, a preliminary injunction issue restraining the said defendant from constructing, building, or maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that on final hearing the court render a decree perpetually enjoining and restraining the defendant from constructing, building and maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that if, pending the final hearing, the defendant shall have constructed and built such structure in Railroad Street, in whole or in part, that the Court, as part of its final decree, issue a mandatory injunction requiring and compelling the defendant to remove the said structure from Railroad Street and to restore the said street to the condition in which it was before the building and erection of said structure.

Third: That if for any cause the court shall consider that the defendant is entitled to build and erect said structure in Railroad Street, that this cause be retained and that the court issue a perpetual injunction enjoining and restraining the defendant from building, erecting and maintaining the said structure, as alleged

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POST

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210

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left as marked on map

First. That a writ of subpoena issue against the defendant, the Northern Pacific Railway Company, requiring it to appear in this court and answer this bill of complaint, but without oath, all answers under oath being hereby expressly waived, and to stand and abide such orders and decrees as the court may from time to time make, adjudge and enter in the premises.

Second: That pending the final determination of the subject matter hereof, a preliminary injunction issue restraining the said defendant from constructing, building, or maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that on final hearing the court render a decree perpetually enjoining and restraining the defendant from constructing, building and maintaining in Railroad Street the elevated structure in this bill described or any structure of a similar kind or character, and that if, pending the final hearing, the defendant shall have constructed and built such structure in Railroad Street, in whole or in part, that the Court, as part of its final decree, issue a mandatory injunction requiring and compelling the defendant to remove the said structure from Railroad Street and to restore the said street to the condition in which it was before the building and erection of said structure.

Third: That if for any cause the court shall consider that the defendant is entitled to build and erect said structure in Railroad Street, that this cause be retained and that the court issue a perpetual injunction enjoining and restraining the defendant from building, erecting and maintaining the said structure, as alleged

RAILROAD ADDITION

Spokane Falls.

in the complaint, until it shall have caused to be ascertained and paid, in the manner provided by the constitution and laws of the State of Washington, compensation for the property of the plaintiffs taken and damaged by the building, erection and maintenance of said structure as aforesaid.

Fourth: And for such other and further relief as to the court shall seem meet and equitable.

(Signed) TURNER & GERAGHTY.

(Signed) POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

State of Washington,
County of Spokane.—ss

Before me, the undersigned Notary Public, in and for the State and County aforesaid, personally appeared Christine B. Kiernan, one of the above named plaintiffs, who, on being duly sworn, deposes and says: That she has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of her own knowledge, except as to matters stated on information and belief, and as to those matters she believes it to be true.

(Signed) CHRISTINE B. KIERNAN.

Subscribed and sworn to before me this 10th day of January, 1913.

(Signed) J. E. PORTER,
Notary Public.

Endorsements: Bill of Complaint of W. H. Kiernan, et ux.

Filed Jan. 10, 1913.

W. H. HARE, Clerk.
By F. C. NASH, Deputy.

176 *H. A. & L. D. Holland Co., et al., vs.*
In the District Court of the United States, in and for
the Eastern District of Washington,
Northern Division.

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN,

Plaintiffs,

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Defendant.

N.-----

IN EQUITY.

The answer of The Northern Pacific Railway Com-
pany, defendant, to the complaint of W. H. Kiernan
and Christine B. Kiernan:

This defendant answers and says:

1. Admits that plaintiffs are citizens of the State
of Washington, residing in the Eastern District of
Washington, and that the defendant is a corporation
organized and existing under the laws of the State of
Wisconsin, and a citizen and resident of such state;
admits that the amount in controversy in this cause
is more than three thousand dollars in value, exclusive
of interest and costs.

2. Admits that plaintiffs are husband and wife,
but states that it has no knowledge with respect to
whether all the property of the plaintiffs, including
real property in the bill of complaint described, does or
does not belong to them, as a community, under the laws
of the State of Washington.

3. Admits that on to-wit; January 20, 1881, the Northern Pacific Railroad Company owned in fee the north one-half (N 1-2) of section nineteen (19), township twenty-five (25), north, range forty-three (43), E. W. M., in Spokane County; admits that said tract of land abutted on the south the town of Spokane Falls, which then had a population of not to exceed three hundred people; admits that on, to-wit; January 20, 1881, said Northern Pacific Railroad Company made, executed, and filed in the office of the County Auditor of Spokane County a town plat of an addition to said town of Spokane Falls called "Railroad Addition to Spokane Falls," and that said addition was laid out upon and occupied a portion of the tract of land heretfore described; admits that upon such plat was shown lots, blocks, streets, and alleys and the names of the streets and the width of the streets and alleys; and admits that the paper attached to the bill of complaint, marked "Exhibit A" is substantially a correct copy of such plat. Further answering in respect to said town plat, defendant says that the dedicatory writing on the paper whereon said plat is delineated, signed by John W. Sprague, and to which is attached a certificate of his acknowledgment thereto before one E. E. Cooper, a Notary Public, under date of December 8, 1880, contained an exception from the dedication of the marked streets on said plat of that strip of land 225.7 feet in width, designated as Railroad Street, and that such exception from the dedication is to be read in connection with the dedication and in connection with and as a part of the whole plat, and each and every part thereof.

Further answering the averments of the bill in respect to the ownership of the real estate occupied by said town plat, defendant says:

The Northern Pacific Railroad Company acquired title to a strip four hundred feet in width across said land, to-wit; two hundred feet in width on each side of the center of its main track as marked and shown on said town plat under the designation of "Railroad Street" for the right of way for its railroad, which said right of way was granted to it by the second section of the Act of Congress approved July 2, 1864, incorporating such company; and that it acquired title to the remainder of said land by section three of said act.

4. Defendant denies that upon said plat a street was marked or indicated as is averred in the fourth paragraph of the bill of complaint, but says that the strip of land referred to therein and marked "Railroad Street" on said plat was and is by said plat and the dedicatory and explanatory writing thereon and a part thereof, excepted from dedication as a street, either in whole or in part; denies that the Northern Pacific Railroad Company in and by said plat or the dedicatory writing attached thereto, or at all, intended to dedicate said strip of land to the use of the public as a street, or at all, or with or without the reservations stated in said bill, and particularly referred to in the fourth paragraph thereof, and denies that from the time of filing said plat, or at all, said strip of land became a public street, and denies that it now is a public street.

Further answering as to the alleged dedication of the strip referred to as Railroad Street, defendant says that the Northern Pacific Railroad Company was

wholly without power to dedicate said strip of land, or any part thereof, as a street, either with or without reservation, or in any other manner to convey or part with title to or easement in the said strip of land granted to it for a right of way, as above alleged. Therefore defendant says if said plat and the writing thereon, or any other matter or thing alleged in the bill of complaint, might or could be considered as a dedication to the public use of the strip of land designated as Railroad Street to the extent alleged in the bill of complaint, or at all, the same was and is wholly void and of no effect whatsoever.

5. Defendant admits that after the filing of said plat the Northern Pacific Railroad Company did put upon the market and sell and dispose of the lots and blocks marked on said plat, and that prior to the year 1889, it had sold and disposed of and conveyed, with the usual covenants of warranty, portions of the lots and blocks shown on the said plat as abutting upon the strip of land designated as Railroad Street, and that in a portion of said deeds it did describe the property conveyed by reference to the said plat; admits that on or about October 5, 1887, it conveyed lot one (1) and west fifteen (15) feet of lot two (2), block twenty-seven (27), of the said Railroad Addition, conveying the same in said deed by reference to the town plat, but defendant states that it has no knowledge as to whether plaintiffs are the owners of said premises in fee, or otherwise, by mesne conveyance from the grantee of said Railroad company, and that it has no knowledge as to the location of buildings upon such lots, the cost thereof, or their present condition and use.

6. Defendant denies that after the filing of said plat, or at all, the strip of land referred to as Railroad Street was thrown open to the public use as a street by the Northern Pacific Railroad Company, and denies that it was used as a street by the public with the knowledge and consent of the Railroad Company, or at all; denies that individuals and corporations used said street for the purpose of ingress and egress, and for light and air, and for other purposes, with the knowledge and consent of the Railroad Company, or at all; admits the destruction of the business portion of Spokane Falls by fire in 1889, including the buildings near to or abutting upon the strip of land referred to as Railroad Street, but denies that such strip of land was one of the principal streets of the town at that time, or at all, and denies that any building standing or abutting upon such strip of land had no other means of access, and denies that the intention and purpose of said railroad company was to open said strip of land as a street; and denies that the same was accepted by the public as a street, as alleged in the bill of complaint, or at all; and denies that the acts and things mentioned in said bill, and particularly in the sixth paragraph thereof constituted a common law dedication of said street to the use of the public. And further answering the averments of the bill in respect to the use of said strip of land by the public, the defendant says that such use as the public made thereof was permissive only and for the purposes of the Railroad Company in affording convenience to the public having occasion to do business with it.

7. Defendant admits that it is now the owner and

in possession of all the property and property rights of the Northern Pacific Railroad Company, and that it succeeded to the same in the year 1896, by purchase at judicial sale, and that it is engaged in operating the line of railroad formerly owned and operated by the said Railroad Company from Lake Superior to Puget Sound, and admits that its line of railway passes through the City of Spokane on the surface of the strip of ground referred to as "Railroad Street."

8. Defendant states that it has no knowledge or information as to whether or not the Northern Pacific Railroad Company, at the time of the filing of the said plat, believed that the town of Spokane Falls would not grow to any appreciable extent. But it denies that there was in law any reservation to the Railroad Company of any uses or purposes in the strip of land marked as "Railroad Street, but avers that in law and in fact the said strip of land was entirely excluded both by operation of the law through the words of exception used, and in the intention of the Railroad Company, from dedication as a public street on said plat. Defendant admits that since the filing and recording of the plat the name of the Town of Spokane Falls has been changed to the City of Spokane, and that the population has grown to approximately 125,000 people; admits that a portion of the lots and blocks in Railroad Addition abutting upon the strip of land marked upon said plat as Railroad Street are in private ownership, and that some of them have been improved by the erection of business buildings; admits that between the years 1881 and 1896 its said right of way on the strip referred

to as Railroad Street was used and employed by the said Railroad Company for tracks laid on the surface thereof, and for a depot building located thereon, but alleges that said strip of land was likewise used for all the needed railroad purposes of said company without let or hindrance from anyone, and solely because such strip of land was regarded by the Railroad Company and by all other corporations and persons as its private property, title to which in fee was owned by it; admits that since the year 1896, the said strip of land has been used and employed by this defendant for the use of its tracks upon the surface of said strip of land, but denies that said strip of land has not been otherwise used by it, but says, on the contrary, that it has at all times used and employed said strip of land, and so much thereof as it desired, for its own private uses and purposes, to the exclusion of every other person or corporation, save such as it may have permitted to use the strip of land for its convenience in the transaction of its business; denies that the lots and blocks in Railroad Addition in general and the lots and blocks in said addition abutting upon said strip of land in particular, would be seriously injured and damaged, or at all, by the use of said strip of land for further additional railroad purposes, and for the construction of the elevated tracks thereon, as proposed by the defendant under the ordinance referred to in the bill of complaint, but says, on the contrary, that all such lots and blocks would be benefited by such change of grade and the operation of defendant's tracks over said strip of land on an elevated grade; admits that it is about to

proceed to build and erect on the strip of land referred to as Railroad Street a dirt fill, secured by retaining walls of concrete and stone masonry, approximately fifteen feet high, and occupying the strip for a width of about eighty-five feet, for the purpose of carrying its tracks at an elevation instead of upon the surface of the strip as at present; but denies that said dirt fill will destroy such strip of land, or in any way impair its use and enjoyment by the public, or by the abutting lot owners for any purpose to which either the public or such abutting lot owners have any right to use it; denies that it will interfere with access of light or air, or any other beneficial use and enjoyment of their property by any abutting lot owners or any other person; denies that the trains which will be operated over the fill when completed will cast upon abutting properties, or upon other property in the vicinity, any dust, dirt, cinders, smoke, deleterious gases, or other poisonous, deleterious or offensive substances in any other manner, or to any greater or different extent than is now caused by the operation of railroad trains along and upon such strip of land; denies that the operation of railroad trains over such fill will cause great or any increase of noise and of jarring from the operation of trains, or that it will at all interfere with the enjoyment of real property in the vicinity, or render the improvements on such property unfit for residence or business purposes, and denies that any such use of the strip will be to the detriment in any particular of the abutting owners, or operate to diminish in value abutting properties; admits that such fill will so occupy said strip

that only about ten feet will intervene between that part of plaintiff's property which abuts upon the strip of land referred to as Railroad Street and the south retaining wall of such fill, but denies that access to the buildings on such property by and through such strip of land will be prevented; and denies that the erection of the fill will cut off or deprive such property of light or air by and through such strip of land, and denies that such property is peculiarly or exceptionally liable to any injurious results from the operation of trains over such fill; and denies that such property, or the buildings located thereon, will be diminished in value in the sum of \$50,000, or at all, by the construction of the fill on said strip of land, as alleged, and denies that plaintiffs will be damaged by the construction of such fill in the sum of \$50,000, or in any other sum whatsoever.

9. Defendant admits that when the fill shall have been constructed upon such strip of land as aforesaid and tracks shall have been laid thereon, that it will receive and transport on such tracks through the City of Spokane the freight traffic of its own and other transcontinental railroad lines, both east and west bound, and avers that such tracks are intended for the transporting of both freight and passenger business; it denies that the operation of trains over such structure will be continuous, or at short intervals, and denies that such trains operating thereover will cause noise, produce jarring, and cast quantities of dirt, dust, cinders, smoke and deleterious gases that will impair the enjoyment and the value of all real prop-

erty situated on or in the vicinity of the strip of land referred to as Railroad Street; admits that the strip of land referred to as Railroad Street extends east and west through the heart of the business center of the City of Spokane, and that some of the most valuable business property in the city, with valuable improvements thereon, lies and abuts upon each side of such street, but denies that the fill to be erected thereon and used as it is intended to be used will be a nuisance per se, or at all, or an unlawful or any other obstruction of such strip of land.

10. Defendant admits that it is acting in part under the duress and compulsion of an ordinance of the City of Spokane requiring it to elevate its tracks through the city so that traffic upon the city streets shall pass over its right of way and tracks otherwise than at grade, but alleges that in the elevation of its tracks and the change of grade of the strip of land referred to as Railroad Street, it acted also in the exercise of its inherent right and power to make such changes thereon as might be necessary for the proper operation of its railroad system, and that under and by virtue of the grant of Congress to its predecessor in interest, the Northern Pacific Railroad Company, of the right of way in which is included the strip of land referred to herein as Railroad Street, it had the power, and it was its duty, at any time to make such changes in the grade thereof as should be required in the proper operation of its railroad line, and it avers that the change of grade which it proposed to make is required for the proper operation of its railroad lines, and that it is essential

to the discharge of its duties to the public that such changes be made, and no act of the Northern Pacific Railroad Company, or this defendant, could or did disable it from exercising its power to make such changes in the grade of its line as should be necessary in the operation of its railroad system. Defendant admits that the ordinance of the City of Spokane referred to contained the section that is quoted in the tenth paragraph of the complaint; admits that an ordinance was drafted by defendant and presented to the city council, and its passage was solicited by defendant; admits that it has for some time sought the passage of an ordinance relating to the abolition of grade crossings, but denies that the ordinance which was adopted was drafted or presented to the city council by defendant, or that its passage was solicited by defendant, or that it has solicited a similar ordinance from the city council for many years, or at all, and that it has been defeated in its efforts to have such an ordinance passed by the protests of property owners of the City of Spokane. Defendant denies that in endeavoring to secure the abolition of grade crossings, its purpose was to improve the grade of its railway through the City of Spokane; denies that no consideration of the public health or safety actuated it in seeking the passage of an ordinance having that purpose; denies that no consideration of the public health or safety actuated the city council in the passage of the ordinance in question; denies that the enactment of the ordinance was a lawless and arbitrary exercise of power on the part of the city council; denies that it was instigated by

defendant; denies that such ordinance was other than it appears to be upon its face; denies that its adoption was for the purpose of destroying or curtailing the rights of abutting property owners to oppose the building of the proposed fill upon the strip of land marked Railroad Street, and denies that it was for the purpose of preventing such property owners from securing adequate damages for injuries inflicted to their property by the building of the structure; defendant also denies that the ordinance is void because the subject matter of the same is by the laws of the state committed to the jurisdiction of the Public Service Commission of the state, but avers that if it be the law that the Public Service Commission of Washington is, under the statutes of that state, alone empowered to compel the separation of grade crossings, that fact is utterly immaterial in the case in hand. The City of Spokane has by the ordinance in question provided for the change of the grade of its streets, a matter of which it has exclusive jurisdiction, and as a part of the plan for the change of such streets, as proposed by such ordinance, it is essential that the defendant change the grade of its right of way and tracks as proposed in such ordinance. The defendant is not opposing such change, but has consented thereto, and even if it be that the Public Service Commission alone has power to compel a change of grade over the protest of a Railroad Company, there is nothing in that rule which forbids a city to change the grade of its streets and a railroad company, such as defendant, to make such changes in the grade of its tracks as will permit the city's plans for grade change to be

effectual. Defendant denies that the ordinance in question is void because it undertakes to authorize an obstruction of one of the public streets of the City of Spokane; denies that it is void because it is an attempt to authorize the maintenance and operation of the defendant's railroad through the city in such a manner as will constitute a public nuisance. Defendant denies that such ordinance confers no authority on defendant to make the change in the grade of the strip of land referred to as Railroad Street without first having had ascertained and determined the amount of loss and injury inflicted on real property abutting upon such strip by the change therein, and without first paying to the owners of such abutting property the loss and injury so caused. Defendant admits that it claims that the ordinance in question authorizes it to erect and maintain the fill along such strip as proposed, and to operate its line of railway thereon without regard to the injurious effects, if any there are, resulting to the abutting owners, and without making to them compensation for the injurious effects, if any there are, upon their property; admits that it denies that the property owners along said strip of land are entitled to compensation because of the change in grade thereon, and admits that it will, pursuant to the authority of the ordinance aforesaid, and in the exercise of its inherent power to make such changes in its own property as shall be necessary for the proper operation of its railroad lines, proceed to construct the fill contemplated by the ordinance along the strip of land aforesaid, and will maintain the same thereon, and will operate its freight and

passenger trains over the same, unless restrained by the injunction of this court.

Further answering with respect to the ordinance referred to in the bill of complaint and particularly with respect to the matters and things set forth in the tenth paragraph of such complaint, defendant alleges that its railroad lines, over which are operated numerous transcontinental trains for the carriage of passengers and freight, extend at grade across the whole of the City of Spokane, being a distance of four or five miles, and that many of the streets of the City of Spokane cross its tracks at grade. Where its right of way and tracks run through Railroad Addition over the strip of land referred to as Railroad Street, it is operating in the heart of the business section of Spokane; wholesale houses in all lines of business have located along its tracks and abutting thereupon are large warehouses where goods are received from and shipped out over its lines of railway. These warehouses are for the principal part constructed upon the strip of land referred to as Railroad Street by virtue of permission so to do granted by defendant. In addition to its through freight and passenger trains and many local freight and passenger trains which pass over its tracks through such railroad addition over the strip of land referred to as Railroad Street, the defendant operates thereover many switching trains engaged in the handling of goods from and to the warehouses aforesaid, and the same thing is true along its right of way on both sides of the said Railroad Addition for a distance of a mile or more. The principal part of the business section of the City

of Spokane lies to the north of defendant's right of way where it runs through the city, but a considerable business section lies to the south of its tracks, and more than one half of the residence section of the city lies to the south of its tracks. In consequence of the location of its right of way through the heart of the city almost equally dividing the population thereof, the traffic across its right of way over the public streets of the city has become very heavy and is growing greater each year. Street railway lines are laid upon many of the city's streets crossing the defendant's right of way, and street cars are continually passing thereover. So great has the volume of business become that there is ever and imminent danger arising from the crossing of defendant's tracks at grade, not only to those who cross its tracks by a street car or other vehicle, or on foot, but to the passengers upon defendant's trains, and the operation of defendant's railroad system through the City of Spokane has been much hindered and impeded, and has been rendered much less efficient than it would be if there were a separation of grades, and in a few years, with the increasing growth of the city, it will become almost impossible to efficiently operate its lines through Spokane. The danger and inconvenience, both to the public and to the defendant, arising from the crossing of defendant's tracks by streets at grade, has long been recognized by the people of the City of Spokane, by the city officials, and by the defendant, and it has been the desire of all that such changes might be made in the grades of the city's streets and of the defendant's right of way as should

do away with grade crossings. After several years of study, negotiations, and consultation, a plan was arrived at for making changes in the grades of the city's streets and of defendant's right of way, so that a separation of grade between the right of way and the streets should be accomplished, and to carry out such plan the city council of the City of Spokane, on or about February 16, 1912, duly passed and adopted Ordinance No. C594, a copy of which is attached hereto, marked Exhibit A and is prayed to be read as a part of this answer, such ordinance being the same ordinance which is referred to in the plaintiff's bill of complaint. The plan of grade separation proposed was agreed to by defendant, and it accepted the terms and conditions of the ordinance in writing, as required by the provisions thereof, and defendant ever since has been and is now willing to comply with such ordinance, and to execute the same in all respects, and even though it had not been so willing to comply with its conditions, the ordinance is mandatory in terms and in character, and the City of Spokane could have compelled defendant to comply therewith.

Still further answering with respect to such ordinance, defendant alleges that therein and thereby the City of Spokane undertook to and did provide for the change of the grade of its streets which have heretofore crossed defendant's right of way and tracks at grade, and that under and by virtue of the laws of the State of Washington the City of Spokane was authorized and empowered in its discretion to make such changes in the grade of its streets. Under and by virtue of

of such ordinance, the City of Spokane is now proceeding to provide for changes in the grade of its streets where they cross the defendant's right of way and tracks, and is proceeding and will proceed to take all steps which are necessary to make the changes in the grade of its streets contemplated by the ordinance in question. If defendant should in this cause be enjoined from making the change in the grade of its right of way and tracks as provided in such ordinance and as it proposes to do in compliance therewith, the City of Spokane will be prevented from making the change in the grade of its streets which is contemplated by such ordinance, and which it is proceeding to make, for the proposed changes in its streets cannot be made unless, as a part of the plan thereof, the change of grade of defendant's right of way is made as required by such ordinance. To enjoin defendant, therefore, from changing the grade of its right of way and tracks is, in effect, to enjoin the City of Spokane from making the contemplated changes in the grade of its streets and to enjoin the enforcement of a city ordinance, and defendant says that therefore the City of Spokane is a necessary party to this suit to answer with respect to the validity of an ordinance duly adopted by its city council and to defend against any decree the effect of which will be to prevent it from carrying out its schemes of municipal improvement.

11. Defendant denies that anything done or claimed by it with respect to the change of grade in question is contrary to equity or good conscience, and tends to the wrong, injury, or oppression of the plaintiffs,

and denies that plaintiffs are remediless in the premises at common law, and can only have relief in a court of equity. It avers, on the contrary, that if it is mistaken with respect to any matter or thing done, or claimed by it hereunder, and plaintiffs are entitled to compensation by way of damages, or otherwise, by reason of the construction of the fill proposed and the operation of the trains there over, that then the matter of the compensation to be paid is cognizable by courts of law in proper proceedings brought therefor, and that the same is not subject to the jurisdiction of a court of equity.

All of which matters and things this defendant stands ready to aver and prove as this court shall direct, and prays to be hence dismissed with its reasonable costs and changes in this behalf sustained.

(Signed) CHARLES W. BUNN,

(Signed) EDWARD J. CANNON,

(Signed) GRAVES KIZER & GRAVES,

Solicitors for Defendant.

EXHIBIT "A"

ORDINANCE NO. C594.

An ordinance requiring the Northern Pacific Railway Company to separate its grade from that of the street grades within a portion of the City of Spokane by elevating the plane of its tracks and by changing the grade of certain of the streets, and affecting certain streets, avenues and alleys of said city.

The City of Spokane does ordain.

Section 1. The Northern Pacific Railway Company is ordered and required to separate its grade from

that of the street grades by elevating the plane of its tracks and by changing the grade of certain of the streets, within the portion of the City of Spokane hereinafter set forth, in the manner and upon the conditions hereinafter specified.

Section 2. The district within which said railway company shall effect the separation of its grade from the street grade shall extend from and including Sprague avenue and Division street on the east to and including Sixth avenue on the west and all streets and avenues exception those to be vacated as hereinafter provided within the limits of said district, shall be crossed at an elevation and in the manner herein provided.

Section 3. As soon as the railway company has completed the separation of grades as herein provided, it shall remove all of its tracks from the present surface of the streets within the district described in Section 2 of this ordinance, and shall not thereafter lay down any tracks across streets at grade within such district, but the railway company may at any time construct, maintain and operate additional tracks across streets within said district in accordance with the specifications in this ordinance contained.

Section 4. Said separation, except at street crossings, and as otherwise in this section provided, shall be accomplished by an embankment of earth or other suitable filling material and in the district extending from Sprague avenue and Division street on the east to Walnut street on the west, said embankment shall be retained by walls of concrete or stone masonry carried up to the sub-grade of the road bed. From the

point where the walls terminate at or near Walnut street westerly to Sixth avenue, a substantial iron fence of design satisfactory to the city council, with concrete or masonry posts shall be constructed between the streets and connected at each with the bridge abutments; provided that between Brown street and Washington street such separation may be accomplished by structurers of concrete, steel or iron, or a combination of these materials. Such materials may also be used at other places between streets according to plans and specifications to be submitted to and approved by the city council.

Section 5. Said elevated tracks shall be carried across the streets and avenues specified herein upon bridges constructed of iron, steel or concrete, or a combination of these materials, supported at the end upon abutments of concrete or stone masonry, so located that the exposed face of the said abutments shall be parallel to and coincident with or entirely outside the outside limits of the streets or avenues, and supported intermediately by three rows of columns, one of which shall be placed parallel to and within the established curb on each side of the streets, the remaining row shall be so placed that the center of same coincides with the center of the street; the minimum spacing of the column parallel with the street shall be 13 feet between centers. Said bridges shall have substantial ballasted floors and shall be so constructed and maintained as to prevent water, dirt, oil or other substances from dropping from the elevated structure into the street. Walls and posts of said bridges shall be calcimined, painted or otherwise kept in a sightly and

cleanly condition upon order of the city council. The bridge across Washington street shall be supported intermediately by one row of columns so placed that the center of the same coincides with the center of the street. Said bridges shall conform generally in their essential featurers to the plan attached and made a part of this ordinance and marked "Northern Pacific Railway Company, Spokane Grade Separation, typical plan for 75-foot street crossing at right angles to tracks."

Section 6. The elevated street crossings herein referred to shall be constructed in accordance with the following conditions and specifications, and the word "grade," as used in said specifications shall be understood to mean in all cases the elevations and rate of grade of the center lines of the streets. These grades and elevations may be varied at the discretion of the commissioner of public works, to the extent necessary, to give proper drainage to all points of the streets affected, to give proper crowning of the roadways and to provide for vertical curves where the algebraic sum of the rates of grades equals or exceeds 3 per cent.

SPRAGUE AVENUE AND DIVISION STREET

	Sprague Street	Division Avenue
Width of roadway-----	51 feet	51 feet
Width of sidewalks-----	12 feet	12 feet
Width, face to face of abutment----	75 feet	75 feet
Minimum vertical clearance-----	14 ft. 6 in.	12 feet

The existing surfaces of Sprague avenue and Divi-

sion street shall not be depressed below elevation 1921.7 city datum.

From the aforesaid elevation, easterly to an intersection with the present surface of the street, at or near the east side of Hillyard street, the grade of Sprague avenue shall not exceed 3.6 feet in 100 feet. From the aforesaid elevation westerly to an intersection with the present surface of the street at or near Browne street, the grade of Sprague avenue shall not exceed four (4) tenths foot in 100 feet.

From the aforesaid elevation northerly to an intersection with the present surface of the street at a point near the south side of Riverside avenue, the grade of Division street shall not exceed 1.62 feet in 100 feet.

From the aforesaid elevation southerly to a point approximately 75 feet south of the south line of Sprague Avenue, the grade of Division street shall not exceed 3.57 feet in 100 feet, and from the last described point to an intersection with the present surface of the street, at a point near the south line of First avenue, the grade of Division street shall not exceed three and four-tenths (3.4) feet in 100 feet.

From Division street to the west side of Pine street the grade of First avenue shall not exceed 2.21 feet in 100 feet; across Pine street the grade shall be level, and from the east side of Pine street to an intersection with the present surface of the street at or near the west side of Hilliard street, the grade of First avenue shall not exceed 5.27 feet in 100 feet.

From Sprague avenue to the northerly curb line of First avenue the grade of Pine street shall not

exceed 4.7 feet in 100 feet; between curb lines of First avenue the grade of Pine street shall not exceed 1.82 feet in 100 feet, and from the southerly curb line of First avenue to the northerly line of Pacific avenue, the grade of Pine street shall not exceed 5.71 feet in 100 feet. From the northerly line of Pacific avenue to an intersection with the present surface of the street at or near the south line of Pacific avenue, the grade of Pine street shall not exceed 0.66 feet in 100 feet.

The railway company shall grade at a gradient not exceeding 12 feet in 100 feet east and west from Pine street approaches in the alleys in blocks seven (7) and (8) of Saunders' addition to Spokane, and whenever these alleys or either of them are graded or improved any additional cost in the work incurred by reason of the changes in grades of Division and Pine streets, as in this ordinance provided, shall be borne by the railway company.

BROWNE STREET.

Width, face to face abutments	75 feet
Width of roadway	51 feet
Width of sidewalks	12 feet
Minimum vertical clearance	12 feet

The grade of Browne street shall not be depressed below elevation 19123.3 city datum.

From the aforesaid elevation northerly to an intersection with the present surface of the street at or near the south line of Sprague avenue, the grade of Browne street shall not exceed 1.5 feet in 100 feet.

From the aforesaid elevation southerly to an intersection with the present surface of the street at or near the northerly line of Pacific avenue, the grade of Browne street shall not exceed 4.6 feet in 100 feet.

The railway company shall grade at a gradient not exceeding 12 feet in 100 feet, east from Browne street, an approach in the alley in block 2, First addition to Fourth addition to Railroad addition to Spokane, and whenever this alley is graded or improved, and additional cost in the work incurred by reason of the change in grades of Brown street as in this ordinance provided, shall be borne by the railway company.

WASHINGTON STREET.

Width, face to face abutments.....	74 feet
Width of roadway.....	51 feet
Width of sidewalks.....	11 ft. 6 in.
Minimum vertical clearance.....	18.2 feet

The grade of Washington street shall remain as it now exists.

STEVENS STREET.

Width, face to face abutments.....	75 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Stevens Street shall not be depressed below elevation 1918.0 city datum.

The grade of Stevens street shall continue northerly on this elevation to an intersection with the present gradient of Stevens street from First avenue to a point 124.9 feet south of the south line of First avenue extended southerly.

From the aforesaid elevation southerly to an intersection with the present surface of the street, approximately 240 feet north of the northerly line of Second avenue, the grade of Stevens street shall not exceed 3 feet in 100 feet.

HOWARD STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	14 ft. 6 in.

The grade of Howard street shall not be depressed below elevation 1914.7 city datum.

The grade of Howard street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 155 feet south of the south line of First avenue.

From the aforesaid elevation southerly to an intersection with the present surface of the street at or near the north line of the alley in Blocks 28 and 29, Railroad Addition to Spokane, the grade of Howard street shall not exceed 2.4 feet in 100 feet.

WALL STREET.

Width, face to face of abutments-----	66 feet
Width of roadway-----	42 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Wall street shall not be depressed below elevation 1916.8 city datum.

The grade of Wall street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 225 feet south of the southerly line of First avenue.

From the aforesaid elevation southerly to an intersection with the present surface of the street at a point approximately 270 feet north of the northerly line of Second avenue, the grade of Wall street shall not exceed 3 feet in 100 feet.

POST STREET.

Width, face to face of abutments-----	66 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Post street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 155.06 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 2.4 feet in 100 feet.

LINCOLN STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Lincoln street shall remain as it now exists, unless the city shall decide to change the grade of same from the south line of First avenue to a point 155.22 feet southerly from the south line of First avenue, before it is necessary for the Northern Pacific to pave that portion of Lincoln street lying between their present right of way limits, in which case the Northern Pacific shall regrade, repave, recurb and re-sidewalk and otherwise improve said Lincoln street

corresponding to the improvements on either side of their right of way from a point 155.22 feet south of the south line of First avenue to a point 300 feet north of the north line of Second avenue, at such grades as the city shall by ordinance establish therefor.

MONROE STREET.

Width, face to face of abutments-----	75 feet
Width of roadway -----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	13 ft. 6 in.

The grade of Monroe street shall be depressed to such an extent that a uniform grade will extend from the present grade of the ground at a point 155.44 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 3.3 feet in 100 feet.

MADISON STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Madison street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 155.63 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid points shall not exceed 3.2 feet in 100 feet.

JEFFERSON STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Jefferson street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 156 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid limits shall not exceed 3.3 feet in 100 feet.

ADAMS STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Adams street shall be depressed to such an extent that a uniform grade will extend from the present surface of the ground at a point 156 feet south from the south line of First avenue to an intersection with the present surface of the ground at or near a point 300 feet north of the north line of Second avenue. The rate of grade between the aforesaid limits shall not extend 2.4 feet in 100 feet.

CEDAR STREET.

Width, face to face of abutments-----	100 feet
Width or roadway-----	68 feet
Width of sidewalks-----	16 feet
Minimum vertical clearance-----	12 feet

The grade of Cedar street shall remain as it now exists.

WALNUT STREET.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	14 ft. 6 in.

The grade of Walnut street shall not be depressed below elevation 1910.4 city datum.

The grade of Walnut street shall continue northerly on this elevation to an intersection with the present surface of the street at a point approximately 10 feet south of the northerly line of Pacific avenue produced.

The grade of Walnut street from the aforesaid elevation southerly to an intersection with the present surface of the street at a point approximately 90 feet north of the northerly line of Second avenue, shall not exceed 3 feet in 100 feet.

From Walnut street to a point 100 feet west of the west line of Walnut street, the grade of Pacific avenue shall not exceed 2 feet in 100 feet.

MAPLE STREET AND SECOND AVENUE.

	Maple Street	Second Avenue
Width between outside supports of bridge -----	75 feet	75 feet
Width of roadway-----	51 feet	51 feet
Width of sidewalks-----	12 feet	12 feet
Minimum vertical clearance-----	14 ft. 6 in.	12 feet

The grade of Maple street and Second avenue shall not be depressed below elevation 1911.1 city datum.

The grade of Maple street from this elevation north-
erly to an intersection with the present surface of the
street at the southerly line of Pacific avenue, shall not
exceed 0.31 feet in 100 feet.

The grade of Maple street from the aforesaid ele-
vation southerly along Maple street to an intersection
with the present surface of the street at a point ap-
proximately 110 feet south of the southerly line of Sec-
ond avenue, shall not exceed 3 feet in 100 feet.

The grade of Second avenue from the aforesaid ele-
vation easterly to an intersection with the present sur-
face of the street at a point approximately 95 feet east
of the easterly line of Maple street, shall not exceed 3
feet in 100 feet.

The grade of Second avenue from the aforesaid ele-
vation westerly to an intersection with the present sur-
face of the street at a point approximately 185 feet
west of the westerly line of Maple street, shall not ex-
ceed 3 feet in 100 feet.

THIRD AVENUE.

Width, face to face of abutments.....	75 feet
Width of roadway.....	51 feet
Width of sidewalks.....	12 feet
Minimum vertical clearance.....	12 feet

The grade of Third avenue shall not be depressed
below elevation 1913.7 city datum.

The grade of Third avenue from this elevation east-
erly to an intersection with the present surface of the
street at or near the east line of Ash street produced,
shall not exceed 2.0 feet in 100 feet.

The grade of Third avenue from the aforesaid ele-
vation westerly to an intersection with the present sur-

face of the street at or near the east line of Oak street, shall not exceed 2.6 feet in 100 feet.

From Third avenue to a point 100 feet south of the south line of Third avenue, the grade of Ash street shall not exceed 2 feet in 100 feet.

FOURTH AVENUE.

Width, face to face of abutments-----	75	feet
Width of roadway-----	40	feet
Width of sidewalks-----	17.5	feet
Minimum vertical clearance-----	12	feet

Supporting posts instead of being placed at the curb line shall be so placed as to provide for a 51-foot roadway, should the same be constructed in the future.

The grade of Fourth avenue shall not be depressed below elevation 1910.0 city datum.

The grade of Fourth avenue from this elevation easterly to an intersection with the present surface of the street at a point approximately 10 feet east of the west line of Oak street shall not exceed 4 feet in 100 feet.

The grade of Fourth avenue from the aforesaid elevation westerly to an intersection with the present surface of the street at or near the east line of Cannon street, shall not exceed 2.1 feet in 100 feet.

The grade of Elm street northerly from the north line of Fourth avenue to an intersection with the present surface to the street, at or near the southerly line of Third avenue shall not exceed 3 feet in 100 feet.

FIFTH AVENUE AND CANNON STREET.

Fifth avenue and Cannon street shall be merged into one crossing, by revising their location and be carried under the elevated tracks through a structure of

the following dimensions, to be constructed with abutments at right angle to said tracks.

Width, face to face of abutments-----	75 feet
Width of roadway-----	51 feet
Width of sidewalks-----	12 feet
Minimum vertical clearance-----	12 feet

The grade of Fifth avenue and Cannon street shall not be depressed below elevation 1905.0 city datum.

The grade of Cannon street from this elevation northerly for a distance of approximately 35 feet to the southerly line of the intersection of Fifth avenue and Cannon street in their revised location shall not exceed 5 feet in 100 feet; the grade across this intersection shall be level, and from the northerly line of the intersection to an intersection with the present surface of the street at or near the southerly line of Fourth avenue the grade shall not exceed 4.7 feet in 100 feet.

The grade of Cannon street from the aforesaid elevation southerly to an intersection with the present surface of the street, at or near the northerly line of the alley in block 24, Cannon's addition, shall not exceed 1.2 feet in 100 feet.

The grade of Fifth avenue easterly from the aforesaid elevation to an intersection with the present surface of the street at or near the west line of Elm street shall not exceed 2.82 feet in 100 feet. From the intersection of Fifth avenue and Cannon street the grade along Fifth avenue westerly to an intersection with the present surface of the street at or near the east line of Chestnut street shall not exceed 3.1 feet in 100 feet.

The said railway company shall, within six months

after the passage and acceptance of this ordinance, procure and dedicate for the purpose of a public street, that portion of block 11, Cannon's Addition to said city necessary to widen Fifth avenue and Cannon street in their new location to their present width of 75 feet, and shall also execute such instrument to the city as will vest in said city the perpetual right to use for street purposes such portions of the right of way of the railroad company as is included within the limits of said Fifth avenue and Cannon street as changed. In case said railway company shall be unable to purchase said property, or any part thereof, at a price deemed by said company to be reasonable, then the same shall be condemned by the City of Spokane for street purposes and the compensation and damages awarded in such proceeding, including court costs and other expenses of litigation that may be incurred therein, shall be paid by said railway company, and said company shall have the right to take part in said condemnation proceedings in behalf of the city by counsel employed by it, and shall have the right to have all witnesses that it may name called to testify in such condemnation proceedings.

SIXTH AVENUE.

Width, face to face of abutments-----	60 feet
Width of roadway-----	40 feet
Width of sidewalks-----	10 feet
Minimum vertical clearance-----	12 feet

Sixth avenue shall be opened, graded and improved by the city through an assessment district as provided by law, and the railway company, by its acceptance of this ordinance, shall be deemed to have consented to

the opening of Sixth avenue across its right of way, and to have waived any claim for compensation therefor, provided it is not required to bear any part of the cost of opening, grading, and otherwise improving said street, other than what it may be legally assessed for such property as it has abutting said Sixth avenue, after being opened. The bridge shall be constructed by the railway company at its expense.

The surface of the street shall not be established at a higher elevation than elevation 1900.5 city datum, at any point under the elevated structure of the railway company.

Section 7. All damages to property arising from the re-establishment of grades of those portions of Stevens, Post, Lincoln, Monroe, Madison, Jefferson and Adams Streets, lying north of the railway company's tracks, as hereinbefore provided, except the property owned by the railway company, shall be paid by the city either directly or by means of an assessment district legally created therefor. The railway company, by its acceptance of this ordinance, waives any claim for abuttal damages by reason of the re-establishment of the grades of said streets, and shall be relieved by the city from any local improvement assessments imposed, or which might be legally imposed, for the purpose of paying for any abuttal damages resulting from said re-establishment of grades.

Section 8. The City of Spokane undertakes forthwith upon the acceptance of this ordinance, by the necessary proceedings to legally establish the changes in the grades of the streets, avenue and alleys specified in Section 6 hereof.

Section 9. All sidewalks and curbs in the streets and avenues where changes of grade are to be made under the provisions of this ordinance, shall be placed at such elevation above the grade of the streets and avenues as the city council may direct.

Section 10. Excepting, as herein otherwise provided, the railway company shall, after it has made the changes in the grades, of the streets, avenues and alleys herein authorized, restore all paving and sidewalks that it may disturb in carrying out the work to as nearly as possible their former condition of usefulness, using the same kind of material, excepting where on account of increase of the grade the city council may require the use of a different kind of material, in which event such other material shall be used. When the tracks have been removed from any of the present street surfaces at any crossing where the tracks are to be elevated as herein provided, the railway company shall with reasonable dispatch thereafter, grade, pave, and provide curbs and sidewalks for that portion of the street upon its right of way situated between the existing paving and sidewalks on each side, and in such manner and with such material as shall conform thereto.

Section 11. The railway company shall provide for the drainage of the several crossings as provided for in this ordinance, by the construction of receiving basins properly located in or immediately adjacent to said crossings, which said receiving basins shall be connected with and discharge their contents into city sewers.

Section 12. The railway company is hereby per-

mitted and authorized to enter upon the streets, avenues and alleys, and make such excavation and do such work, as may be necessary to carry out the separation of grade as herein provided, also to obstruct or close temporarily any streets, avenues or alleys to such extent and for such length of time as may be reasonably necessary; also make temporary changes in its tracks at the present street grade crossings and construct and maintain temporary structures and falsework in the streets, avenues and alleys, subject to the approval of the commissioner of public works.

Section 13. All water pipes, sewers and other utilities owned by the city, including all service connections necessary with the abutting property, shall be moved to the position made necessary by the change of grade in streets, avenues and alleys under this ordinance by the city, under the supervision of the commissioner in charge of such utilities at such a time and in such manner as will interfere as little as possible with the work being carried on by the railway company.

The cost and expense of changes in position of utilities owned by the city, made necessary by the change of gradient, including the replacement of such utilities at the proper depth to secure as nearly as may be their former state of usefulness, shall be borne by the railway company, and the cost shall be paid into the city treasury monthly upon the rendering to the railway company by the proper department of the city, bills for the expense incurred in this work during the previous month.

All work upon the streets, avenues and alleys required to be done by the railway company, under this

ordinance, shall be performed to the satisfaction of the commissioner of public works.

Section 14. The railway company, by its acceptance of this ordinance, agrees to indemnify and save harmless the city from all loss, costs and damages which it may suffer, or which may be recovered against it, on account of damage to persons or property arising out of the performance of any of the work to be done by the railway company, or by the city, under the provisions of this ordinance, including the damage to abutting property resulting from re-establishment of street grades, and including lawful damage resulting from street vacations.

Section 15. The City of Spokane will exercise to the full extent its police and other powers, to require all persons and corporations occupying or using any portions of the public streets, avenues or alleys affected by the provisions of this ordinance to conform, at their own expense, such occupation or use to the grade changes, alignment and structures herein provided for, and to that end to do all the excavating, filling and other work necessary to such conformation, and to require all street railway companies to also repave that portion of such streets between their rails, and where there are two or more tracks, between their tracks, all of such work to be done at such times and in such manner as to cause the minimum amount of interference or hindrance to the work of the railway company, and nothing in this ordinance shall be construed as relieving any person or corporation, so occupying or using such streets, avenues or alleys, from liability to make such changes and do such work at their own

sole cost and expense. If it should transpire that the powers of the city are inadequate to that end, then the city will prosecute such condemnation proceedings as may be necessary, and the railway company shall pay such judgments as may be finally awarded and the costs of such proceedings.

Section 16. The railway company shall bear all the expense of effecting the separation of grades in the manner herein provided, including the damages to abutting property resulting from the changes in the streets, avenues and alleys herein authorized, excepting such expenses as are to be borne by corporations or individuals under the provisions of sections 6 and 15 hereof, and such abuttal damages as are to be borne by the city under the provisions of section 7 hereof, and if suit shall be brought against said city to recover damages on account of said changes, timely notice thereof shall be given the railway company, and it shall have the right to defend the same in the name of the city, and no such suit shall be settled without the consent of the railway company. If it shall become necessary for said city to bring condemnation suits in furtherance of the work to be done under the terms of this ordinance, said city shall bring the same upon request of said railway company, and said railway company shall aid in and have the right to control the prosecution of said suit through counsel selected by it.

Section 17. The City of Spokane undertakes by appropriate proceedings to vacate such portions of any street, avenue or alley as are upon the right of way of the railway company in the district between Sprague

avenue and Division street on the east, and Sixth avenue on the west, and across which overhead bridges are not to be constructed by the railway company under the provisions of section 6 hereof, such vacation to be made effective before the tracks are elevated across the streets, avenues or alleys to be vacated.

Section 18. When the railway company has elevated its tracks in accordance with this ordinance, so that the same are ready for use, then and thereupon, all provisions of the ordinances of the city of Spokane having for their purpose the protection of street traffic at grade street crossings, shall cease to be applicable to such railway company as to that portion of its tracks so elevated.

Section 19. Such lighting as may be ordered by the city council to adequately illuminate the streets and sidewalks beneath said bridges shall be provided and maintained by said city at the expense of the railway company. Bills for said lighting shall be paid monthly by the railway company.

Section 20. Said railway company shall begin the work by it to be performed under the terms of this ordinance on or before October 1st, 1912, and thereafter diligently, continuously and in good faith prosecute said work until the separation of grades required by this ordinance is completed, said separation to be completed on or before October 1st, 1915, unless prevented by weather conditions, strike or strikes, or legal proceedings, injunction order, or other process of a court of competent jurisdiction, and said railway company shall give notice in writing, to the corporation counsel of said city, of the institution of legal pro-

ceedings or the pendency of any strike or strikes; and said city shall thereupon have the right to intervene in any suit or proceeding and move for a dissolution of injunction or restraining order, or for any other proper order, remedy or relief.

Section 21. Nothing in this ordinance contained shall be deemed to be a waiver or surrender of any of the police powers of the city, or be taken in any way to deprive the city of the right to properly exercise such power.

Section 22. All the work done under the provisions of this ordinance by the Northern Pacific Railway Company, by direct employment of labor or by contract, shall be performed on the basis that citizens of Spokane, married men and men of families, shall be given preference in employment; the lists of the city free employment office are at the disposal of said railroad company to this end.

Section 23. The railway company shall accept the terms and conditions of this ordinance within 45 days after its passage, by filing with the city clerk of said City of Spokane a written acceptance of the same, and if not accepted within said time, said ordinance shall be null and void unless further time be expressly given by the city council.

Section 24. This ordinance shall take effect and be in force 30 days from and after its passage.

Passed by the City Council, Feb. 16, 1912.

W. J. HINDLEY, Mayor.

Attest: C. A. FLEMING, City Clerk.

Service of within answer is hereby acknowledged
this 5th day of February, 1913.

(Signed) POST, AVERY & HIGGINS,
For Plaintiffs.

Endorsements: Answer of Defts. to Bill of Complaint
of W. H. Kiernan et ux.

Filed Feb. 5, 1913.

W. H. HARE, Clerk.
By F. C. NASH, Deputy.

*In the District Court of the United States for the East-
ern District of Washington, Northern Division.*

No. 1580.

H. A. & L. D. HOLLAND COMPANY, A COR-
PORATION,
vs. *Plaintiffs.*

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION, *Defendant.*

No. 1581.

GEORGE TURNER AND BERTHA TURNER,
HIS WIFE,
vs. *Plaintiffs.*

NORTHERN PACIFIC RAILWAY COMPANY,
A CORPORATION,
Defendant.

No. 1582.

H. J. SHINN AND PHOEBE SHINN, HIS WIFE,
vs. *Plaintiffs.*

NORTHERN PACIFIC RAILWAY COMPANY,
A CORPORATION,
Defendant.

No. 1586.

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN, HIS WIFE,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
A CORPORATION.

Defendant.

BEFORE: Hon. Frank H. Rudkin, Judge Pre-
siding.

APPEARANCES.

For the Plaintiffs:

Messrs. Turner & Geraghty,

Messrs. Post, Avery & Higgins.

For the Defendant:

Messrs. Cannon, Ferris & Swan,

Messrs. Graves, Kizer & Graves.

STATEMENT OF FACTS.

BE IT REMEMBERED, that the above entitled cause came on regularly for hearing in the above entitled court, on May 12, 1913, before the Hon. Frank H. Rudkin, Judge Presiding; the plaintiffs being represented by Messrs. Turner & Geraghty and Messrs. Post, Avery & Higgins, and the defendant being represented by its attorneys, Messrs. Cannon, Ferris & Swan and Messrs. Graves, Kizer & Graves.

THE COURT: Are counsel ready in the case set for trial this morning,

MR. TURNER. Yes, sir, we are ready.

MR. GRAVES: We are ready.

THE COURT: You may proceed.

MR. TURNER: Is your honor familiar with the pleadings in this case?

THE COURT: I am not.

MR. TURNER: There are four cases here, all against the same defendant, the Northern Pacific Railway Company. The parties plaintiff in the first case are George Turner and Bertha Turner; in the second case H. A. & L. D. Holland Company, a corporation; in the third case W. H. Kiernan and Christine B. Kiernan; and in the fourth case H. J. Shinn and Phoebe Shinn.

The parties have agreed on the following stipulation:

It is stipulated that all four of the above entitled cases shall be consolidated for the purposes of trial and of appeal, in case an appeal be taken by either side, each case, however, to be considered on its own merits, and the testimony offered to be applied to each case as the court may find it to be relevant, and a separate decree to be entered in each case as the equities of the case may require.

It is further stipulated that no testimony need be offered concerning the extent to which the property of the complainants will or may be damaged by the structure described in the complaint, which defendant is proceeding to erect, and that if the court is of opinion, after a consideration of the equities of the cases, that its decree ought to depend on the extent to which the properties will be damaged or injuriously affected, then the court shall proceed to ascertain and determine that matter in accordance with the law and practice of the court.

It is further stipulated that in case of an appeal by

either of the parties, plaintiff or defendant, that originals of all exhibits offered in evidence by either party shall be sent up instead of copies, and that such exhibits need not be printed as a part of the printed record.

MR. GRAVES: That is correct.

DR. J. E. GANDY, a witness called on behalf of the plaintiffs, after being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. TURNER.

J. E. Gandy; residence, Spokane; age 65 years; physician and surgeon by profession. Have lived in Spokane since March 19, 1880, a little over thirty-three years. Northern Pacific at that time not completed to Spokane; the survey was made, but there was no construction here then. The road was constructed through Spokane in 1881, the summer of 1881. I am familiar with the addition laid out by the Northern Pacific Railroad called "Railroad Addition to Spokane Falls." I bought some property in that addition from the company. I bought lot 2, block 16. That was the second lot east of Lincoln Street, on First and Railroad, and I bought two more where the Williard Hotel now stands, corner of Madison and First and Railroad. These lots front on what is called Railroad Street; I bought them with that understanding and I thought they did. I think they do. An old gentleman named Abernethy was the agent of the railroad company at that time. He was the land agent in charge of lots in Railroad Addition. He sold the lots to me. He represented that the lots fronted on Railroad Avenue, and stated that it was a wide avenue or wide street, and was especially desirable on that account.

To the question to which the statement last above given was responsive, the defendant objected on the ground that the matter inquired about was irrelevant and immaterial and not within any issue presented by the bill. The testimony was admitted by the court subject to the objection, which it reserved for further consideration.

The witness resuming: I bought these lots after they were put on the market, probably May or June, 1881. I bought the three lots all at the same time—that is, about the same time. There was some building on Railroad Street the first summer after the addition was put on the market. The following summer I built on lot 2, on the south end of the lot, about the first building up there, a little building that was called Railroad House. It was used for a hotel. It covered the full width of the lot, 50 feet wide and about 75 feet deep, one story. It fronted on Railroad Street, right opposite the old Passenger and Freight Depot.

Q. What is the fact as to the general use of Railroad Street by the public after the filing of the plat of Railroad Addition to Spokane Falls?

MR. GRAVES: I object, if the court please, as immaterial, irrelevant and incompetent, and it could not modify or change the terms of the written plat, and the railroad would have no power to establish the street by mere usage.

THE COURT: I will admit it subject to the objection.

A. It was used as the principal driveway to and from the Passenger Depot from the downtown dis-

trict, which was then on the corner—the business district was then on lower Howard Street from Front Avenue south, a block and a half probably. It was used as much as any street in town, except possibly Howard Street and possibly Front—that is, talking now of the early history prior to the beginning of 1883 and 1884. It continued to be a used street, much used street, up to the time of the fire, the big fire in August, '89, August 4th, 1889. That fire swept away everything on Railroad Street east of Lincoln Street. Lincoln Street was the west line of the fire. At the time of the fire Railroad Street on the north side was nearly all occupied by buildings from Lincoln Street east and Monroe Street east until you got up to Howard Street and some on Howard Street and Railroad. The buildings were generally wooden buildings and most of them one story. One or two of them were two-story buildings. On the south side of the track there were not so many buildings. Those on the south side of the track were used mostly for residences. The Northern Pacific had a Land Office over there, an old red building that had been used for—built by them for some purpose and they had a land office over there, and Mr. Newberry was sent up from Colfax in this land office and kept an office there for the purpose of selling their real estate here. Mr. J. T. Hanna had a two-story residence in the block just south of the track west of Lincoln Street. George Lowman had built two or three cheap one story buildings on the same block by the side of that and there were a couple more buildings on the corner of Lincoln and Second. One of these fronted on Lincoln and Second, and the

other fronted on Lincoln and Railroad, on the Lincoln Street side. On the other side of Lincoln Street were some buildings, I don't remember the owners of them, fronting on the avenue—towards the Railroad Street. The buildings were on the south lots fronting on Second Avenue, but the buildings were all fronting north toward the Railroad instead of toward Second Street. As the buildings increased on Railroad Avenue the travel increased. On the corner of Howard and Railroad we had our bell tower, city building for fire protection, and a little wooden building that was built for a counsel room, and people in going to the depot mostly always went by this, and went right down this railroad right of way to the depot. It was the principal thoroughfare to the depot. As compared with First Avenue, the street immediately north, there were a great many more buildings on Railroad Street than on First for the reason that First Street was a rocky street and was not opened for several years afterwards. I had bought two lots where Tull and Gibbs now are, bought them from Frank Moore, who bought them from the Company, and being interested in them and the buildings there, I took particular—I have a better recollection than I would if I hadn't owned the property there. I built a corrugated iron warehouse on these lots, fronting on Railroad Street, and Mill Street. The warehouse was one story and it fronted 110 feet on Railroad Street and 150 or 155 feet on Mill Street. I had only built it a few months when it was burned in the big fire. In the same block R. W. Forrest, the first Mayor of the city, had a wooden building fronting on Railroad and Second Street, and then west of that upon

a lot that Jones and Dillingham now own, that is the lot that belonged to Victor Dessert, there was the Rush Hotel, a hotel that fronted on Railroad and Post; and the block on First Avenue was not opened. It was a good big rock there and we didn't blast that out for several years afterwards. The next block west I owned my little hotel, my little Railroad Hotel. First Avenue was in the same condition then. It was full of rocks and was not cleared up for several years afterwards. But Railroad Avenue not having any rocks in it at all, was used as the principal street on account of its being free from rocks. The travel was principally there on account of it being a free open street, while First Avenue was filled with rocks. Compared with Front and Main Streets, well in the early history Front and Main were much more prominent than Railroad Street, that is from 1880 up to the next two or three years. But as time went on Front became less and less used, Railroad more and more used. Up to the time of the fire Front Street had become principally a second-class street, while Railroad Street had improved very materially in that five or six years. There was a hotel called the Sprague Hotel on Railroad Street, built by a man named Kinsell. It stood on the west side of Post on the first two lots and it fronted south on Railroad Street. It was burned prior to the big fire. It and the California House were the two best houses in town. The Sprague House was a fine hotel and it was recognized as one of the finest hotels in the upper country. The next lot to the Sprague House was occupied by a two story building—lot 3, that is the one that the fire originated in, the big fire, the lower story

was a saloon and the upper story a lodging house. The fire originated in the lodging house. I owned the next building to it and rushed down to it at the time of the fire and by the time I got there my building was afire. My building, as I said before, was fifty feet fronting on the Railroad right of way. It was called the Railroad House.

Q. Tell us now, Doctor, in a general way, how fully Railroad Street was built on at the time of the fire, giving us the boundaries east and west, as well as you can, and how fully between those boundaries it was built on and the size of the structure.

A. Take the one that my hotel was on, that is the one immediately north of the depot building, that was all built up; there wasn't a vacant lot on it at all. The next block east, the one Tull and Gibbs is in, was all built up; there was buildings on every lot. All of them fronted on Railroad; because First Avenue was not open. The next block, the block that belonged to General Merriam, had very little improvements on it. The bell tower stood on the east lot, right on the corner near where the alley now is, what we used to call Railroad Street, though now they designate it as an alley, the bell tower stood right on that alley. That was the only building, the bell tower, and a little counsel room, was the only building I remember of being in that block, the Merriam Block, which was a small block, at the time of the fire. Then, on the east side of Howard Street in a building where the Columbia Building now stands, two-story wooden buildings fronted on Howard Street and a one-story wooden building on either side of it. That whole lot was built

up fronting on Howard Street. Howard Street was the principal street north and south, and that was entirely built up on the northeast on Railroad, east of the Columbia Building there was some wooden buildings. Mr. Bunch had a residence on the east side of Stevens, and Major Wimpie had a house there that he was living in. There were residences that both fronted between Stevens and Washington. Up to the time of the fire there was never any interruption of the use of Railroad Street by the Railroad Company, that I remember of. Never heard of any objection. There were no obstructions of any kind in the street, except the tracks and the railroad depot. At the time of the fire, Spokane had grown to be several thousand, ten thousand probably. I don't remember. There were sidewalks on Railroad Street. I remember building a sidewalk in front of my own lot where Railroad Hotel was. I don't remember much about the sidewalks. I know I had to put down one in front of my fifty feet and I know there was sidewalks clear across that block. Don't remember about sidewalks further east or west. There were hitching posts in front of my building opposite the depot, just on the edge of Railroad Street. The street from Monroe on the west to Washington on the east, six blocks, was used for traffic.

CROSS-EXAMINATION.

BY MR. GRAVES:

In block 25, lots 10 and 11 on south side of Railroad Street, there were buildings at time of the fire in 1889. On lot 10 was J. C. Haines' residence and drug store, and on lot 11, on the north end fronting this way

(north) was three little wooden buildings; on lots 7 and 8 was a one story wooden building fronting Lincoln Street. In block 26, on lots 11 and 12, were some wooden buildings. I don't know who the owners were. And block 27, I think they were on lots 6 and 7, there was a building, a red building used as a kind of railroad office. On block 28, Taylor and Sharkey owned an agricultural implement house, on lots 5 and 6, corner of Howard Street, it was lots 4 and 5 instead of 5 and 6. Henry Brook had a house on block 29 or 30, one one of the inside lots. It faced north. It was on the south tier of lots but faced north, faced the alley through that block. It was south of the alley. I have named all the buildings I recall on the south side of Railroad Street.

On the north side of the track and south of First Street I built a house on lots 5 and 6, block 19, that I lived in. That house faced north, faced First Street. Block 18 had quite a number of residences on it before the fire. Those on lots 5 and 6 faced on Monroe Street and the houses on 1 and 2 fronted on Madison and First both, and on 3 and 4 they fronted on First. That block was entirely built up with wooden buildings prior to the fire. Block 17 was occupied by wooden buildings, and I guess every lot except possibly one or two. They faced on First Street, some faced on Lincoln.

Block 16 didn't have any facing on First Street except lot 1, because it commenced to be rocky from there east; all the rest fronted south except over on Post Street there was one fronted on the north end of that lot, on First street. First Avenue from Lincoln

Street east for pretty near two blocks was nearly all rocks, and practically impossible to travel. Post Street, a cross street, was in the same condition. Coming now to block 15, I bought 4 and 5 of Frank Moore and I built my warehouses there fronting on the Railroad. They were strictly warehouses. Mr. Dart used the one on Railroad and Mill for selling machinery, used it for a retail house for selling machinery.

Block 14 belonged to General Merriam and as I said had nothing on it except the bell tower on the east side of Howard Street. Block 13, east of Howard, had some wooden buildings fronting on Railroad and Howard both. First Avenue was clear of rocks on that block and there was some travel there on First Avenue east of Stevens Street in to the Bunch residence and Major Wimpie's residence. The Bunch residence fronted on Stevens and Major Wimpie's fronted on First near the railroad track. On Washington was the water tank. Recurring to block 15, that was entirely built up, every one had a house on it. That is the block the fire originated in. I don't recall any other buildings in these blocks.

At the time Railroad Addition was laid out, Spokane Falls had between three and four hundred people, I think. From that time the town progressed right along, I don't think the town was awfully busted in 1884 at the time the Coeur d'Alene mining boom flattened out. At the time of the fire in 1889 the town had close on to 10,000 people, between nine and ten thousand. First Avenue had not been graded at the time of the fire. Some grading had been done on Howard Street clear over to Second. I don't think

any of the cross streets had been graded across the track. Some grading was done on Second Avenue very early. No cross streets had been graded to the south of the track, except Howard.

The railroad right of way all through was flat level and gravelly. No obstruction to travel in it. I don't remember any other tracks on Railroad Street than those indicated on the town site plat at that time. The depot was there as indicated and so remained up to the time of the fire. It was both passenger and frieight depot. There was business east of Railroad Addition up as far as Division Street, before the fire. Havermale's Addition had a number of business houses on it before the fire, east of Washington on Main Street. There were also a number of residences as far up as Division Street. I meant Bernard. Havermale undertook to establish a business center there, corner Bernard and Main, there were two or three stores, and quite a little business center. West of Railroad Addition was Brown's original homestead, and in 1880 Brown's was about the only house there. On the south side of the track Cannon's was the only house there in 1880. The first eight or nine years later there got to be quite a number of residences in Brown's and Cannon's Additions. Taylor and Sharkey's building, I rather think, was on the north half of the tier of blocks south of the railroad. That was a wooden building. I don't recall any other on the north half of that tier of blocks. Howard street opposite that block (the Taylor and Sharkey warehouse block) was not filled with rocks so that one could not get on it at all. The Northern Pacific Agent's office was also

on the north end of the south tier of blocks. I don't recall any others now. All that tier of blocks, like railroad street, was level, flat gravel ground. There was no line of demarcation between the north line of those blocks and the right of way of the railroad, nothing at all. There were stakes set by the surveyors in front of our lots. On the south side people just drove along there promiscuously, either on the right of way or on the north tier of blocks where there were no buildings. When I talked about them traveling the street I was talking of travel north of the track. On the north side of Railroad street the north end of the lots were rocky. The south end were generally smooth. These lots were built on very early. People did not drive along there promiscuously, there was a well defined roadway close to the railroad track, not right close to it, it was between our building and the track. I am referring now to all the blocks west of 12, west of 12 as far as Madison or Jefferson. There was well defined roadway from Howard street west to the depot. It came up to the extreme end of the lots. The driveway wasn't so well defined after you got west of the depot. Since the fire the strip of land where that driveway was has been leased for railroad warehouses. A good portion of it is now covered by warehouses. It has been so occupied by railroad warehouses since the time immediately after the fire. This driveway has ever since 1889 or 1890 been entirely covered by warehouses. And the same thing is true all the way from Washington street west to Adams.

Only the first two or three years after the fire there were very few of them leased.

Witness was here shown a map marked Defendant's Exhibit 1, and asked if he recognized that as being correct as to the occupancy of Railroad street at the time of the fire or before the fire or after the fire. The witness resuming said: Well the depot stood across right adjoining Howard street, and that wooden building was built across Monroe street, that stood across the street and we objected. Had to take them into court to get it out of there. I remember there were quite a number of switches in addition to those shown on this map very shortly afterwards. As far as I know that shows the tracks there right after the fire. I cannot testify as to the number of tracks. It looks generally about the way it was. The Sprague House burned some years before the fire. I don't remember the year.

REDIRECT EXAMINATION.

BY MR. TURNER:

Up to the time of the fire there were no tracks on Railroad street other than those shown on the plat of Railroad Addition. The additional tracks shown on the map exhibited to me were put there after the fire. Everything east of Monroe street and north of the railroad track, was burned by the fire of 1889. Thirty two blocks were burned. The business of the Northern Pacific increased remarkably after the fire by reason of the bringing in of building materials. That necessitated additional trackage, and accommodations for handling the traffic of the Railroad Company. It was at this time the permission was given

to put up the temporary wooden structure there. The permit was for one year. The freight depot was built about two blocks long, reached from Howard west to Post, we objected very seriously about obstructing Mill street. They claimed to have a permit to put up a temporary wooden building. The city was rebuilt largely the first two years after the fire. The large bulk of the materials came from the outside, brick, lumber and stuff of that kind. Railroad street was used for storing this material until it was needed in the construction of their buildings. On this plat of Mr. Graves, the elongated lines around the depot represent the platform of that building. There was nothing but a little platform on the south side connected with the first depot. That map is not a correct representation of the depot before the fire. The depot across Mill street was not moved when the year was up, and we objected to its staying there any longer. They never took it down until the court compelled them to. The first of the warehouses on Railroad street was on the block on Howard street where the Hughes place now is. That was built shortly after the fire. They commenced to build along through there the first year or two after the fire. The original warehouse was in front of Judge Turner's present building and was a wooden building. That was afterwards torn down. The present building is the third building put up on that ground. The encroachment on Railroad street has been gradual. Some of the warehouses have been put up lately. One is being built now. The first six or eight years after the fire people were too busy about other things to pay much

attention to such things. The buildings on block 15, all faced on Railroad street, except a few that faced on Post and Railroad both. Post street was open. The Rush House fronted on Post. It stood on lots 1 and 2 of block 15.

RECROSS EXAMINATION.

BY MR. GRAVES:

In block 17, lot 6 was the Lion Saloon fronting on Railroad and Lincoln, the south end of lots 5 and 6; it stood there at the time of the fire. On lots 1 and 2 of that block were some houses fronting on First Avenue. Lots 3 and 4 I think were not improved. Consequent on the rebuilding of the city there were additional switches put in on Railroad Street, and tracks, and that has continued ever since. They ran about two passenger trains a day, one each way, before the fire, and about one freight train, before the fire. After that they ran a few more trains. From that time the business has grown and they have run more trains and built more tracks. There has been more demand for warehouses as the city and the business grew.

H. J. SHINN. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

H. J. Shinn; residence Spokane; age 46 years; one of the plaintiffs in this cause; have lived in Spokane since 1883. Own lots 5 and 6 in block 29 Railroad Addition. Since the commencement of this suit, part of the retaining wall for the dirt fill has been built

in front of these lots. The wall is about 14 feet from my buildings.

Mr. Shinn was then shown three photographs, and stated they correctly represented conditions as they then existed with respect to the retaining walls built since commencement of this suit. These photographs were admitted in evidence without objection and marked PLAINTIFFS EXHIBIT 2, 3 and 4.

MR. TURNER. How does that structure effect your building as to light and air?

Objected to by Mr. Graves as incompetent and irrelevant. The court admitted the testimony subject to objection.

A. I have no frontage except that on the railroad. My buildings are built facing the railroad. My corner lot has a side frontage on Stevens street, my inside lot no frontage but the railroad; but my buildings on both lots face Railroad avenue. If the structure is put up as planned by the railroad I will have no means of getting to the front of my buildings except over a four foot platform I have on the north side of my buildings.

MR. TURNER: Now what was the condition of Railroad Street when you came here in 1883?

THE COURT: To what extent does the defendant dispute the testimony of J. E. Gandy?

MR. GRAVES. I haven't any reasonable doubt that Dr. Gandy has told things approximately as they were. He has got his dates a little confused. Of course we will show that the tracks were increased. We will show by subsequent maps the increase of

tracks. But I have no doubt there was a kind of general travel the way he states.

THE COURT: You may proceed.

A. Just about as shown on this map here (Plaintiffs' Exhibit 1), and with one or two tracks around the depot. I have driven over this street a great number of times; it was used universally by the public. I never heard of any obstruction to public use prior to the fire; never heard of any objection by the railroad company prior to the fire, never saw any signs or warnings against its use.

Up to the time of the fire there were quite a number of business buildings on the north side of the track.

THE COURT, to Mr Graves: Do you admit the testimony of Dr. Gandy in that regard?

MR. GRAVES: I think the testimony of Dr. Gandy in that regard is substantially correct.

MR. TURNER: We have an additional feature to show by each witness we shall put on.

THE COURT. Very well.

MR. SHINN: There was quite a number of buildings from Lincoln east on the north side of the tracks. I remember two hotels. The Russ House and Sprague House. I remember the hotel built by Dr. Gandy, but don't remember its name. The buildings on the street extended east to Howard Street. There were a few residences east of Howard Street, and a one story building on the corner of Stevens Street that was used as a bottling works fronting on Railroad Street.

On the south side of Railroad Street there was a warehouse on the corner of Stevens Street and

another on the corner of Howard facing the railroad. This was the Taylor and Sharkie implement house; the other was occupied by Mr. Brook, with brick and lime. There was a grocery store on the south side of Railroad Street on the corner of Post, owned by a Mr. Stewart. I remember the residence of a Mr. Hanna on the south side facing the railroad. I do not remember about the fence, but there were sidewalks on the opposite sides of the streets. The travel was straight up and down Railroad Street, on either side of the track. The principal travel was between Howard and Lincoln Streets, which were the only streets graded.

MR. TURNER: Do you remember the time when Mr. Van Houten, as agent for the Northern Pacific Railroad Company, sold your father, or attempted to sell your father, a lot on Railroad Street, and what statements were made about Railroad Street at that time?

Objected to by Mr. Graves as incompetent, immaterial and irrelevant, not within the issues raised by the pleadings and not within the power of the agent to contradict the plat.

Objection overruled.

A. Father owned property on the corner of Wall and Second Street, had a planing mill there, and Mr. Van Houten and Mr. Newberry desided to sell to this mill the property adjacent facing the railroad. Mr. Van Houten told him at that time that this Railroad Avenue was a wide street and an open street, and that would give him a better way to get in and out with

their wagons and teams and so forth. There was no trackage there except the main track at that time.

CROSS EXAMINATION.

BY MR. GRAVES:

The conversation (that last above referred to- was with either Mr. Van Houten or Mr. Newberry. The other parties to the conversation were my father and myself. Told us it was a street, open street, and would give a chance to get in and out. I understood he was referring to Railroad Street. I don't know that I understood how wide Railroad Street was, except judging from the other side the buildings were on—up to the line there practically. The other side there was built up practically solid in 1886 or '87. I mean the particular block north of this block on Second and Mill. I understood it was a street then and have understood it since. I took a lease from the Railroad Company for land on the tracks, but don't think the land leased by me is part of the street or right of way. I took no lease of part of the right of way, neither has my company.

They travelled along Railroad Street promiscuously, now on one side and now on the other. They could not cross over the tracks except at Howard and Post, the only streets open. They could not cross over the tracks very well with a team; a person afoot could. In travelling along, at times you might be on Railroad Street, and other times on private ground. They generally followed the line of the Railroad. They might be on the street line of the lots or might be on the street line of Railroad Street, but they were never liable to be off the right of way because that was

graded,—I wouldn't call it graded, but it was smoothed off so that you could drive along.

MR. GRAVES: The railroad kept it in better condition for people to cross to the depot; is that it?

A. I guess they kept it in better condition for their own use and not the public. In travelling, sometimes they might be on the street and sometimes on private ground. They drove principally on the railroad on the two lines here (indicating), this was their principal drive. We had a well defined road there between Howard and Post, on both sides of the track. I think the road went up as far as Stevens Street, east; I can't say as to the south side of the track. I can't say just where the road was, but think it was on the lot line because there were some buildings up on Stevens Street that were presumed to be on their line.

I have owned lots 5 and 6, in block 29, about 16 years. It has been occupied ever since by the general kind of business now carried on there. There are two classes of business in the buildings, machinery, and merchandise, wholesale and retail mining machinery and wholesale merchandising.

The platform running in front of my building is about three and one half feet wide. It is on my property, on the lot line. A track runs in front of it, maintained by the defendant company. There has been a track in front of me ever since I bought the property, but the present track, put in during the last year, is much closer than the track that was there before. I presume the track is maintained there for the convenience of my tenants. Their goods are all

shipped in there in car load lots, but not taken out in car lots. They are all taken out by way of the railroad—in car lots; have been taken out that way for the last fifteen years. I have an alley in the rear. It is simply a lane so that teams can get in there and turn around and get stuff out. An alley is there and has not been shut up.

MR. GRAVES (showing witness plaintiffs' Exhibit 4): That structure is less than the height of your first story, isn't it,

A. The structure is higher than my first story. The height of my first story is about thirteen feet six inches. The engineer of the Northern Pacific told me the retaining wall was fourteen feet and a half.

The track that is now in front of my building accommodates my building the same as the track that was there before. There were a number of tracks to the north of where the wall is before it was built, but teams could get in there to the cars. The track that is now before my buildings was planked over by me. I don't remember whether the track that was there before was planked. The tracks shown in Plaintiffs' Exhibit 2 in that block have not been molested for some time.

DIRECT EXAMINATION.

BY MR. TURNER:

The old track in front of our building was laid about twelve or fourteen feet farther north than the present track—the one laid down last year.

MR. TURNER: Now Mr. Graves asked you about the travel on the south side of Railroad Street. Were there or were there not buildings fronting on that

street sufficient to give people the general line of the street in traveling up and down the street?

A. There were quite a number of buildings to the east and to the west fronting on Railroad Street, sufficient to give the traveling public a line on the south side of the street. I don't think there was much zig-zagging going between Howard and Post, because there was a sidewalk on this side of the street. On either side of the street, north or south of the track, as I said before, it was a very good road, and we kept in the main road.

RECROSS EXAMINATION.

BY MR. GRAVES.

The sidewalk I am talking about was on the north side, between Post and Mill. It was in front of the buildings. I do not know whether the buildings came up to the lot line or not. I cannot say whether the sidewalk was in the right of way or back on the lots; I know it was in front of these buildings.

WITNESS EXCUSED.

The plaintiffs offered in evidence certified copies of the town plats of Cheney, Sprague and Ritzville, executed and acknowledged on the same date as the town plat of Spokane, containing indentially the same language in the dedicatory clauses and showing Railroad Street platted on the right of way of the railroad company, made by the railroad company.

Objected to as immaterial, irrelevant and incompetent.

The plats in question admitted in evidence subject to objection, and marked PLAINTIFFS EXHIBITS 5, 6 and 7.

GEORGE F. CHRISTENSEN. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

My name is George F. Christensen. I live at Ritzville, Washington. Have lived there for fifteen years. Am 37 years old, and am engaged in the business of abstracting. Railroad Street shown on the plat of Ritzville, Plaintiffs' Exhibit 7, is used as a public street between C. and E. Streets; that is for two blocks. In this distance it is built on on each side; it is built up pretty well in block 9; block 10 on the corner is well built and on the other corner also, and there are some shacks. On the other side—south side—there isn't much. There is a building here (indicating) and a saloon and livery stable and Chinese laundry, and of course the warehouses. The street is freely used to this day by the public without objection on the part of the company, so as far as I know. This has been the condition as long as I have lived there. Block 15 faces Railroad Street. On the south side the only entrance the saloon and laundry in this block have is from the railroad.

CROSS EXAMINATION.

BY MR. GRAVES:

I have not measured the width of Railroad Street on the ground; all I go by is the plat. The street scales on the map 225 feet. The town of Ritzville extends beyond the limits of this plat on each side of the railroad tracks. Some of it was platted by individuals. Railroad Street is travelled between C Street and E Street. A warehouse is built west

of C Street across the right of way to the north of the track, crossing the whole street there. West of that it is vacant, it is not travelled; there is no street there. To the east of E Street the yards come down in here (indicating). It is used; they travel this; this is travelled. By "yards" I mean sidings. They occupy the whole surface up to the corner of block 7 and 8 here, and east. These switches were put in several years ago. One of them was in when I first came there. The warehouses were put in there, to the best of my knowledge, some eight or ten years ago. It is used on the south side between the same streets I have named—clear though. The depot is right between blocks 9 and 10 on the northerly side of the track—across D Street. The new depot has been there about a year. The old depot was on the opposite side—same place. That depot was there about twenty years. They have a platform running to this depot starting in on E Street and running west to C Street; running right along the depot and side of the tracks. This platform has been there two years; before that there was simply a platform at the old depot, running, I should judge, half a block in front of the depot, running between the railroad and the depot. The platform still runs between the railroad and the depot. People going to and coming from the depot use the street marked Railroad Street, and have so used it all these years; used both sides to get to the depot. It was used by the public promiscuously; people travel it as a public thoroughfare. It is open and unobstructed. This is likewise true of various portions of Ritzville not built up; like any other town that has not been

filled up with buildings. The people cut across here and there when lots are vacant; and then when people build, they go somewhere else.

Here the witness marked on the plat, Plaintiffs' Exhibit 7, the location of the depot and the walk testified to.

The part enclosed within pencil marks represents the depot proper, and the part which is now enclosed represents the sidewalk. The sidewalk to the old depot was in the same place, only it was a great deal smaller. The people drove along to the depot on the north side of the track; that is where people got into the rigs after they alighted from the trains, or started to go up town afoot after alighting from trains, and where people came to the trains.

The witness then put the word "depot" and "platform" at the proper place on the plat, to identify it.

REDIRECT EXAMINATION.

BY MR. TURNER:

Railroad Street is not used merely as an approach to the depot, but is used by the public generally for all purposes.

WITNESS EXCUSED.

JOHN I. MELVILLE. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

My name is John I Melville, age 34; occupation lawyer; I live at Sprague. Have lived there something like eleven years. I was acquainted with Sprague before that, and went there quite frequently. I know the location of Railroad Street in Sprague.

MR. GRAVES. I suppose it will not be necessary to repeat the objections to the introduction of testimony as to these several towns.

THE COURT: I think it will be understood all of this testimony is objected to.

WITNESS: When I first knew Railroad Street in Sprague, what was known as the Denninghoff Hotel was located on the corner of Railroad and B Streets and from there on down to C Street was one of the principal business parts of the town. The buildings faced Railroad Street. That was on the south side of the street. On the north side I recall there were some, but not many business houses. Further west on this side, there was a hotel on the corner of D and Railroad Streets. At that time Railroad Street was well travelled; it was the important street. There are some business houses on Railroad Street at this time. There was a fire in Sprague in 1895 or '96, which burned out all of the business houses on the south side of the street. The street has been rebuilt since that time, and is now fairly well built. Railroad Street is used as a street without objection from the Company at this time.

CROSS EXAMINATION.

BY MR. GRAVES:

Referring to the plat of Sprague, Plaintiffs Exhibit 6, the depot now is on the same side of the street, as there shown, but a little further east. There are now two tracks south of the main track.

There are some buildings in the space marked "Railroad Street" on the plat. The Standard Lumber Company has a building there, opposite lots 1 and 2

in block 6. Further down the track are the buildings of the Sprague General Supply Company, built, I should judge, about nine or ten years ago. Before they were built, I think there was a lumber yard there. Down at C Street there is a space of fifteen feet between the north lot line of block 8 and the warehouses, which abut right on the sidetrack; this space is used as a driveway for wagons.

The warehouses at this point have been there about nine or ten years. I don't recall that there was anything there before that. There is a ditch in what is marked D Street, runs down that street across to the northeast corner of block 9, and ends there in the street somewhere opposite lots 4 and 5 in block 9; to the west of that, and in the street opposite lots 1, 2 and 3 in block 9, is a warehouse. This warehouse occupies most of the street up to the sidetrack. This warehouse has been there twelve or fifteen years. It is a wheat warehouse. There is an elevator in the warehouse in front of block 8, and the wheat is loaded from there into the cars in bulk; beyond this the space is vacant.

Going to the north side, opposite block 5, there is a railroad pump house, there is a wheat warehouse beyond that. There are some buildings belonging to the Railroad Company on the north side, opposite block 4. The roadmaster uses them for some sort of office building and tool house. Between that and the depot is a travelled way. From C to E there are no buildings on Railroad Street. It is a travelled way. Down here is another warehouse. That is on E Street, and between the warehouse and the north of block 1

is a travelled way that the residents down in that end of town use to travel back and forth to town. Quite a great deal of the street appears to be occupied with warehouses and things. In one block south of the track, and two north it is not obstructed in any way, but the balance of it is pretty well occupied, so that, as you say, it may be necessary to cork-screw around.

WITNESS EXCUSED.

MARTIN J. MALONEY. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

My name is Martin J. Maloney; I am 53 years of age, and live at Colfax, Washington. I am a hotel proprietor. I came to Sprague in 1881, and lived there from that time till 1887. I am familiar with Railroad Street in Sprague. From 1881 till the time I left there it was the principal street. It was built up solidly from B Street to the corner of the street west on the south side of the track. On the north side, the same block, opposite, was built up, with, I think the exception of one lot. The Hotel National stood on the corner of the block on the north side; then came a butcher shop; and on down to B Street a little shop and a saloon. Railroad Street was used as a thoroughfare—it was used as a street. It was used like other streets—was the principal street then. I hardly think the same condition prevails at this time. Center Street, a block further south, seems to have been built up; Railroad Street is still a busy street and used by the public, but I wouldn't regard it as the principal street in Sprague today, although it is

still used as a street, and built on with houses and business buildings.

I am familiar with the town of Cheney. Court was held there until 1886, and I attended court. I was deputy United States Marshal; my mother-in-law lived there, and I used to visit her very often. I attended all the courts, and was there often between. I was familiar with Railroad Street in Cheney. The buildings faced on this street. The Oakes House, the principal hotel, was facing on this street. It was the finest house in eastern Washington. There was a restaurant; my mother-in-law ran a restaurant that faced the street, just west of the Oakes House. The opposite side of the street was built up facing the track. The street was used as a thoroughfare by the public at that time, without objection. This is the condition now as far as I know.

CROSS EXAMINATION.

BY MR. GRAVES:

I don't know whether the Oakes House, and the other buildings mentioned by me were on a part of Railroad Street or not, that is in the street. I know they faced on Railroad Street, because I have stood on the porch and watched the trains go by. The building faced on the street, and the railroad was across the street.

On the lower side of the street (south side) where the Cole House was, I don't think the topography permitted much travel. It was not graded. They were not grading streets then. The sidetracks were there. One sidetrack was a little above the depot, further west from the depot.

REDIRECT EXAMINATION.

BY MR. TURNER:

I would say the front of the Oakes House was approximately 100 to 125 feet from the center of the main track.

WITNESS EXCUSED.

LUCIUS G. NASH. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION

BY MR. TURNER.

Lucius G. Nash; residence Spokane; lawyer; forty-four years of age. Have lived in Spokane since 1880.

MR. TURNER, (showing witness a photograph): Is this a correct representation of Spokane Falls as it existed in 1882?

WITNESS: It is. It was taken in 1882. (Photograph then offered in evidence and marked PLAINTIFFS' EXHIBIT 8). I know it is correct. It shows the house where we lived in 1881. I am familiar with Railroad Street, as laid out on the plat of Railroad Addition. That street was constantly used from 1881 to the time of the great fire in 1889. It was used by the public as a thoroughfare. I never heard of any objection to its use on the part of Railroad Company. There were no signs warning the public off; nothing of that kind in those days. They commenced building on this street in 1881. Alexander Warner lived on the south side of the track, and it was used as a residence district right away, facing on the track. Starting from Washington Street and going west to Lincoln Street, houses were built on there, scattered, of course, in 1881, 1882 and 1883. The south side of

the track was mostly given to residences; and on the north side of the track, clustering around the depot, business houses sprang up there quickly, and parallel with the railroad was a well beaten road used by everybody—upon both sides. Commencing with Washington Street and west of Lincoln, it was used on the south side. On the north side it was used west to Cedar Street. I have ridden on it many many times as a boy. Railroad Street on both sides was used habitually by the public as a street; that is all there is to it. They commenced to build on the north side immediately after the railroad was completed through the town, and the particular block adjoining the Sprague Hotel was immediately built up with lunch and restaurant places, barber shops and saloons. There was a cluster of business houses there immediately. That was the block between Post and Lincoln. By the time of the fire in 1889, it was built continuously through from Washington to Lincoln street. I don't mean to say that it was solidly built up between those limits, but continuously. There were business places here and there. John Todd's bottling works stood where the Orpheum Theatre now stands, facing on Railroad Street. The Taylor and Sharkie implement place was the biggest implement and wagon house in town. It faced on Railroad Street, but not at the time of the fire. It faced on the street in 1885 and 6. The building stood there in 1889, but Taylor and Sharkie had gone out of business. It was occupied up to the fire. There was also a brewery on the south side of the track—the Lion Brewery—and a hide and fur depot. Mr. Brook had a lime and brick concern

right down where the gas plant stands. Railroad Street was as well beaten a track as Howard—as any street in town; maybe in some respects, at one time more so than any other street in town.

CROSS EXAMINATION.

BY MR. GRAVES:

I am speaking of the time between 1881 and 1889. They commenced to travel up and down in 1881. I can't say what time in 1881 they commenced to travel. A school house was built on the south side in that year. The photograph shown here fairly represents conditions as they then were—about the time the railroad came. It shows some level ground, a lot of rocks and a lot of trees. People rode and drove where they chose. As the town grew up and places were fenced, we were confined to particular places. They travelled wherever they pleased until they were forced out. This came to an end in 1887 to 1889. About this time they had been pretty well confined to streets. There were lots of rocks and big hummocks all around, but not on the north side of the railroad. There were some small rocks there, but they did not interfere with travel.

Up to 1887, while it is true people generally cut across lots where the ground was vacant, they did not cross Railroad Street that way, because they could cross the tracks only at the points where there were crossings; that is at Howard, Post, Monroe and where the depot now is east of Washington Street. Travel on the south side of the street was induced by the fact that there were several businesses carried on there,—a lumber yard, a brewery—and that a

number of people had their homes there. There were only a few crossings put in, and people travelled along Railroad Street from one crossing to another. People went to the depot in the same way. Sometimes they would go on one cross street and sometimes on another to get into Railroad Street, and then they would drive parallel with it to the depot. If the people on the south side wanted to get along from one part of it to another, they would have to use it. That is all the use there was of it during those early days.

REDIRECT EXAMINATION.

BY MR. TURNER:

The house facing Railroad Street, shown in the photograph I identified, was McLaughlin's house. This is our house and barn (indicating). McLaughlin's house was not standing there at the time of the fire. It had been moved back facing the other street. He had a blacksmith shop on the corner facing the railroad.

RECROSS EXAMINATION.

BY MR. GRAVES:

(The witness identified the houses referred to by making the figure 1 on the house he had lived in, and a figure 2 on the McLaughlin house).

The McLaughlin house was right north of the right of way where the Hotel Spokane now stands, facing Railroad Street. It is now in the heart of the business district.

WITNESS EXCUSED.

FRANK JOHNSON. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

My name is Frank Johnson; I am 66 years old. I live in Spokane. I have lived in Spokane thirty-two years, and have been a contractor all of that time.

(The witness was then shown a photograph).

I know this photograph. It was taken the time I laid the foundation for the first freight depot that was built here. It was a freight depot. There is a little passenger depot besides that. The photograph was taken in July 1882. The large building shown off to the right a little to the west is the Sprague Hotel. It was built just about that time.

The photograph referred to was offered in evidence, marked PLAINTIFFS' EXHIBIT 9.

During all the time that I have lived in Spokane, I have been familiar with the street marked "Railroad Street" on the plat of Railroad Addition. It has been used continuously, considerably by the public, as a thoroughfare; was even before I built this depot, because it was a well beaten road at that time. It was used on both sides of the track, but of course was used more on the north side than the south side. Up to 1889 it was built on in some blocks almost solid, in other blocks it was scattering. It was more fully built upon the north side. In a general way I can remember the particular buildings erected there for special purposes. There was a place called the Railroad House, and later on in the same block as the Sprague House, there was a hotel run by a man named Seaman. It was called, I think, the Ross House. By 1889 I should say the north side was con-

tinuously built up between Post and Mill. Some buildings and sidewalks, and before others there were cinders. Cinders had also been put on Railroad Street in places to improve it. It made it a pretty good thoroughfare because there was a great deal of heavy hauling done over those roads at that time. The buildings I refer to all faced Railroad Street. On the south side of Railroad Street and fronting on it there were quite a few residences, all fenced with yards in front on Railroad Street, quite nice little gardens and lawns. I remember some business houses on the south side of the street. There was the Taylor implement house, and a lime and brick establishment. Up to the time of the fire there were no obstructions of any kind in Railroad Street. It was commonly called "Railroad Avenue." Whenever they went in that direction that would say "I went to Railroad Avenue" or "did you get this on Railroad Avenue." Among the old timers it wasn't called Railroad Street." It was called "Railroad Avenue." All the east and west streets were called avenues, and still are.

CROSS EXAMINATION.

BY MR. GRAVES:

The foundation shown in the photograph I built across Post Street on the south side of the track. The passenger depot is the large building shown in the picture with projecting eaves. The reason I know the foundation for the freight depot was built across Post Street is because a committee of citizens of Spokane stopped me from building; said I was building across the street; and I telegraphed to Sprague, and they made me take thirty feet off that and put it on the

east end. That moved it east of Post Street—cleared the street. The picture showing the trees to the west in Browne's Addition and Hangman Creek valley is a pretty good representation of conditions as they were in those days. There was nothing to prevent anybody from travelling around there pretty near as they pleased. Generally of course, the road was naturally more beaten up and down the avenue here, because it was used more, and consequently a person will go where the roads are broken instead of going across the gravel. The roads shown in the picture went by the depot, and people having occasion to go along that way would naturally use them. The sidewalks referred to were east of the section shown in the picture. There were quite a few sidewalks at the time the picture was taken. I don't know whether the sidewalks were in the street, or not. I know they were in front of the buildings. I would not pretend to say what buildings had sidewalks, because I did not pay particular attention. There were walks on both sides, but more on the north than the south side. They were principally residences on the south side. There were residences abutting right up on the railroad right of way, and fenced, between Post and Mill. These are the ones I spoke of in my direct examination. There were sidewalks in front of them. The sidewalks were mostly of cinders. Lots of places on Riverside in those days had cinders. There were cinder driveways too. The cinders came from the locomotives of the railroad. People made sidewalks in front of their houses with them.

WITNESS EXCUSED.

W. S. NORMAN. Called and sworn on behalf of plaintiffs, testified as follows.

DIRECT EXAMINATION.

BY MR. TURNER:

My name is W. S. Norman; I am fifty-five years old. I came to Spokane in February, 1884. Am proprietor of the Spokane Hotel. Have owned it since 1900, but have been interested in it as a stockholder since 1894. I am familiar with the manner of the construction of the hotel. It was started before the fire, in the spring of 1889, by Mr. Brooke, as a building for stores, offices and warehouses, and was up one story when the fire came. The fire swept the block on the opposite side of the street leaving this building, so far as built, intact. Immediately after the fire arrangements were made to convert the building into a hotel building, and it was done. As originally planned, the building had a frontage on Railroad Street, and has today. The building is arranged with its rooms facing upon Railroad Street, and at the time of its construction it had three doorways leading out onto Railroad Avenue. The windows faced Railroad Avenue.

In 1885 I was a member of the firm of A. A. Newberry & Company, and prior to that time was with Mr. Newberry, in the handling for the Northern Pacific Railroad Company, of a portion of Railroad Addition to Spokane Falls, Second, Third and Fourth Additions, all put on by that Company. While acting in that capacity I sold some lots fronting on Railroad Street. I sold General Carlin, who was then Commander of the post at Fort Sherman, two lots, in

between Post and Mill, or Post and Lincoln Streets. I also sold, or rather completed the sale of two lots to B. C. Van Houten, also fronting on Railroad Street, and adjoining the Carlin lots; and I think I sold one more lot in the same block. I think with that exception, and the block between Howard and Mill Streets, the Company had sold all the rest of the lots. We had a plat of Railroad Addition on the wall in our office. It was in the form of a tracing similar to the plat here. I had no instructions respecting the plat or Railroad Street,—only to sell them. The general understanding of the public was that Railroad Street marked on the plat was a public street.

MR. GRAVES: We object to the witness testifying as to what was the general understanding of the public.

THE COURT: Objection overruled.

A. Now I sold one of these lots, an inside lot, it would be valueless without some frontage. By inside lot I mean a lot that had no frontage on any corner, only had a frontage on Railroad Avenue—Railroad Street. We sold inside lots and corner lots equally with reference to the plat.

MR. TURNER: I have got here a map of Spokane made in 1883. Are you familiar with that map?

A. I remember this map very well. It was a regular city map, and in general use at that time. It is a correct map of the city as it was at that time.

The map was offered in evidence without objection, and marked PLAINTIFFS' EXHIBIT 10.

When I came to Spokane in 1884, the north side of the track was an important street, as in all of these towns, for small businesses such as hotels. I stopped at the Sprague House, which was on a corner fronting on Railroad Street. My brother bought a lot running from First Avenue back to Railroad Street, immediately behind the freight house, and put up some cottages,—two cottages, in one of which we lived. On the south side of the street, Harry Stimmel had a residence on the railroad block, between Mill and Howard, and there were scattered houses both east and west on the right of way.

As to the condition in 1889 at the time of the fire: Of course the center of the town at the time of the fire had practically established itself at Howard and Riverside. There was still a great deal of business done on Stevens Street. The Sprague House was burned down I think late in the fall of '86, and some small buildings had been put up in its place. Taking the north side of Railroad Street: The corner of Stevens and Railroad Avenue had a residence on it, then on the corner of Howard Street there was a bottling plant. On the opposite side of Howard Street, to the west, there were the city hall and fire station. We used to have the town meetings there. I don't think there was anything in that block west of this till you got to Mill Street, and then there were small ownerships in there—and buildings. Then when you got to the corner of Post Street there was a saloon, and then opposite that, to the west of Post, was the Sprague House and one or two small places. The rest was solidly built, I think to Monroe Street.

On the other side of Railroad Street, down towards Jefferson Street, an Englishman by the name of Harvey had built facing the right of way. East of that, on the south side it was built scatteringly. I can call to mind but four houses on that side of the track. I remember the Taylor and Sharkie store and Henry Brooke's residence where the gas works are. Up to the time of the fire Railroad Street, within the limits I have described, had been used as a public thoroughfare by the public generally, and has been used ever since in a confined form. Until a few weeks ago there was a roadway about sixty or eighty feet wide, between the service track to the warehouses and the main track.

The Spokane Hotel, my hotel, is the principal hotel in the city. I suppose it is worth \$1,000,000. We have 260 rooms. It abuts for 200 feet on Railroad Street. I think the effect of elevating the railroad tracks would be to increase the noise and bring the dirt up that much higher. It would be very hard for me to answer the question to what extent it will destroy the usefulness of my building for hotel purposes until the damage has been done, but the raising of the tracks sixteen feet in the air necessarily carries the burden of the noise and of soot and of dirt that much higher to injure the rooms above.

Q. Will it or will it not make the use of your hotel less desirable for the accommodation of people as a hotel?

Admitted by court subject to objection.

A. It must depreciate the renting value of the upstairs rooms, by the increase of noise and by the in-

crease of dirt and dust. It will make the rooms partially undesirable.

CROSS-EXAMINATION.

BY MR. GRAVES:

The public got the understanding that Railroad Street, as shown on the map (plaintiffs' exhibit 10) was a public street from the fact that the buildings all faced the street, and business was transacted there. I don't know what the public thought as to the street down through Cannon's and Browne's Additions, that was pretty well out in the woods. I never traded very much in land down there. I don't know whether there was any public idea as to whether Railroad Street through those Additions was a public street or not. There was no occupancy there. Yes, lots faced on Railroad Street, precisely as they face here. I don't know people have driven down there. I don't remember driving along the right of way. They might have driven along a portion of it. My idea is that if there are lots facing the right of way having no other way to get in, it would be a street.

MR. POST: We will have to put in the plats of Browne's and Cannon's Additions. That was dedicated as Railroad Street in both of these additions.

MR. GRAVES: Perhaps it was. I am asking the witness about it.

WITNESS. If Mr. Browne sold that lot, that inside lot, and said it faced on this street, I would say that it did face upon it. But this is not the way I got my idea that it was a street in Railroad Addition. Then when property was sold, that we handled, we always had this plat with the dedication and description

upon it, and we always described the street as 125 feet wide. I inferred it was a street, and not only inferred it was a street, but the people who owned the property on each side inferred it was a street, and built buildings and faced them on it.

There is a track along the buildings on the south side now, but they get in in some places with a team. They put blocks of wood across so they can back in. Some of them have wood crossings. Quite a number of them use the street this way.

My lots are 3, 4, 5 and 6, in block 13. Back of me there is an open alleyway, part of the right of way, and then there are the buildings of Fairbanks-Morse, Washington Liquor Company and Hughes & Company. I think the first of these buildings was put there about eight years ago—the Fairbanks-Morse building. The Liquor building was built in 1907. The other was built two years ago. There was a small building there before, one built just after the fire. The railroad company moved a wooden building in where Fairbanks-Morse's building is, shortly after the fire, and it was used as a grain warehouse or a temporary warehouse at the time of the fire. This wooden building continued there till Fairbanks-Morse built. Their building covers a larger area than the former. There was a narrow frame building where the Washington Liquor Company's building is, put up at the time of the fire. It was about eighteen feet wide, possibly, with the platform. There has been, and is yet, fourteen feet of paved street back of our building—part of Railroad Street. The south side of the buildings in front of our hotel is about 100 feet south of the south side of

our lots. Yes, since 1889 a portion of the 100 feet to the south of the hotel has been occupied by buildings, except the passageway which has always been there. This passageway I speak of is an open space back of our hotel, between it and the warehouses. We have paved it—I mean the owners of the property. I don't think it was done by the city authorities. The city had nothing to do with it. Yes, I have claimed this is a public alley. I made the claim because it was part of the public street. I objected when the buildings were built. I have always objected against it. We have not gone to law about the thing, but we have always protested against them. If the buildings were removed we would have what the real estate is entitled to, and what the purchaser figured, I presume, when he bought, a double frontage. We would have a frontage on First Avenue on one side, and on Railroad Avenue on the other. The removal of these buildings might temporarily be a disadvantage to the hotel business; but I would rather have the double frontage, even at the risk of injuring the hotel. I have never taken any steps to have the buildings removed, but have addressed the City Council upon the subject many times. I have not addressed the council in writing. The Railroad Company have known me as a protester. I protested to Mr. Cooper, I suppose a half dozen times. I protested to Cooper about ten years ago. I said it was not fair to block up the streets there. I have protested often. I protested to Mr. Bemis for one. That was a year later. I can't remember what I said, but I have always held the position that it was a street. I don't remember what I said to Bemis. I have raised

the issue twice with the City Council of the City of Spokane. First four years ago, when they first started to bring up this matter of elevating the tracks. I then said to the council I thought it was a public street, and that we had our rights in it, but that so long as it stood as it was we were not protesting very hard. I joined in a protest when a part of the street in an adjoining block was closed. These are the only protests I have ever made.

The Hughes building is a substantial three story brick building. It was put up about a year ago. I said nothing when it was put up. The machinery house is a substantial two story brick building. I said nothing when this was built. These buildings are from thirty to forty feet high. They come up to the third story of my hotel on Stevens Street, and to the fourth story in the middle. All of those buildings have platforms on the track, about the height of box cars, for loading and unloading, precisely the same as the warehouses across the railroad here.

JOSEPH HUNT. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

I am an abstracter. I have here a list showing the ownership of all of the lots and blocks fronting on Railroad Street in Railroad Addition; also the dates of conveyance from the Northern Pacific Railroad Company, with the names of the original grantees. The list is taken from the abstract books in our office.

The list was then offered in evidence, and marked PLAINTIFFS' EXHIBIT 11.

I have examined the terms of the deeds conveying the various lots from the railroad company. The deeds are all alike, there is very little variance. I have one of them here—the majority of the deeds from the Northern Pacific Railroad to the original grantees describe the property this way:

“The lots numbered 1 and 2 in block 12, of the Railroad Addition to Spokane Falls, according to the recorded plat thereof on file in the Auditor’s office of said county.”

All the deeds were warranty deeds.

WITNESS EXCUSED.

M. S. BENTLEY. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

My name is M. S. Bentley; I am fifty-one years of age, and have lived in Spokane since 1882. In the early days I was a building contractor here. I have been acquainted as long as I have lived in the city with what is marked on the plat of Railroad Addition as “Railroad Street.” In 1882 it was a street the same as the others. It was a street of the city, and was built on to some extent at that time. At the time of the fire in 1889, the north side of the street from Howard to Post was pretty well covered. The south side was not so well covered, although it was pretty well built on. Then down below Monroe Street there were scattered houses pretty well down to where Browne’s Addition starts.

The building concern I was with built the masonry work for several places on both sides of the street. On

the south side there were some residences between Stevens and Washington. They fronted on Railroad Street. They were surrounded by fences, had fences on the line of Railroad Street. Then further west, on the south side, there was a building that was occupied by an implement warehouse, owned by Mr. Taylor; then west of that was Mr. Stimmel's residence, and then west of that there were quite a few houses. There was a little grocery store, I think, owned by a man named Stewart. This was near the corner of Post and Railroad Streets. Then west of that there were quite a few buildings. We put some buildings up there—on the south side—for Mr. Hanna—we built the brick wall of the Hanna building.

Going to the north side, after Mr. Brooke sold his property on the south side to the gas company, we moved the house over to the north side, onto the property where the Hotel Spokane now stands, and built a large brick warehouse there facing on Railroad Street, and faced the residence on Stevens Street. And then going west to Browne's Addition, why we usually put up buildings there.

We built the brick work of the Hotel Spokane. The building was originally designed as a wholesale house, and at the time of the fire we had the west wall up a story high, and the south wall just a scaffold high. The building as then designed fronted on all three streets. After the fire the building was changed into a hotel.

Up to 1889 there was never any obstruction to the free use of Railroad Street by the public, and I never heard of the railroad company making any objection

to its use. I never saw any notices informing the public that it was not a street. With the exception of the depot and tracks it was unobstructed.

CROSS-EXAMINATION.

BY MR. GRAVES:

I don't think I mentioned all the buildings that were on the south side of the track at the time of the fire. I don't know the names of all the buildings that were there. I should think the south side was about one-third built up. There were three buildings adjoining Mr. Hanna's. They were put up for renting purposes. They were not owned by the Northern Pacific Railroad Company. That is all on the south side. That was in 1883 and 1884. There were no streets graded, but there was a road street, opened up there, between the lot line and the tracks. As to cross streets, Howard was practically the crossing. I don't know whether Howard Street was graded at the time of the fire. It did not wind around. It was a street, a lane you might call it, built up on either side and a street run through the center. There were no other crossings at that time. People did not drive wherever they chose along the track. There was a marked street there, south of the track and north of the track and north of the lot line. By 1889 there were quite a good many cross streets, a crossing on Howard and a crossing on Monroe. Howard, Post, and I think Monroe Streets, were graded south of the track in 1889. It was a good road. I don't know whether they had been graded by the city. By 1889 the travel was pretty well confined to the streets shown on the plat. There was no cutting across lots in 1889. There might have

been maybe across one lot that was not fenced up—footmen walked across.

Taking the north side: Between Lincoln and Mill was practically built solid. Small houses—maybe every other house would be one story and the others two story. There were several hotels in there. There was the Russ House and the “Railroaders’ Home,” or “Railroad House,” and then there were several other little lodging houses with stores underneath. Further down it was pretty well built up with residences. I think that in 1889 the tracks were as shown on the plat. I don’t remember of any others. I wouldn’t be sure there were tracks there. I don’t remember how many. There were no tracks laid near the lot lines.

WITNESS EXCUSED.

DR. J. E. GANDY. Recalled for further examination, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER.

I don’t think the fire of 1889 extended over to the south side of the tracks. No buildings on that side were burned.

WITNESS EXCUSED.

RUFUS MERRIAM. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

Rufus Merriam; age sixty-one; I have lived in Spokane since March, 1888. My brother, General Merriam, owned the block fronting on Railroad Street, between Mill and Post—block 14. I took charge of this block for my brother when I came here in 1888, and

had charge of it from that time to January 1st of this year. I have been somewhat familiar with the street marked "Railroad Street" on the plat of Railroad Addition since coming here. At the time I came here the north side of the street between Lincoln and Howard was pretty well built on by wooden buildings. On the other side there wasn't so many, but I think there were some warehouses on that side. The buildings on our block 14 did not face on Railroad Street; they faced Howard. The Todd Bottling Works on the opposite side of the street from us had a frontage on Railroad Street. During that period the street was pretty generally used from Lincoln or Monroe on the west to Stevens on the east. There were no objections whatever to the use by the public on the part of the Northern Pacific Railroad Company or anybody else. I never observed any signs or warnings against its use. There were no obstructions in the street up to the time of the fire.

CROSS-EXAMINATION.

BY MR. GRAVES:

There is a large building between block 14 and the railroad tracks now. It was built by Armour in 1902. It is built of brick and two stories. This is on the Mill Street side. On the Howard Street side there is a three story brick building used by McGowan Brothers. This building was put up in 1904. Going to the west of block 14 on the north side there is now a row of buildings along the track between the track and the property line all the way down. These buildings have been there for many years. Some of them were built a few years after the fire. They extend out

on the south side for the distance of approximately 80 feet from the lot line. They are at present used as warehouses, and have been built up gradually from time to time, as the needs of business called for it. They have platforms and most of them are built up some distance above the ground at the proper height for loading and unloading into railroad cars. On the south side of the street there is a small row of buildings extending through the same territory east and west. These buildings are not on Railroad Street. They are built on the property line facing Railroad Street. These buildings are all warehouse buildings at the present time, but some of them are used likewise for stores. Some of them have platforms like the buildings on the north side. Some of them have no platforms, but the general rule is to have platforms. On the south side the warehouses are not built in the street. The present condition is that from Adams to Stevens Street, Railroad Street is flanked on either side by warehouses, making a solid warehouse district there with railroad tracks on either side running in front of the platform so that goods may be loaded and unloaded from the platform on to the cars. On the south side I think a few buildings were built before the fire. Since the fire the buildings increased rapidly until the street has reached its present condition. When I first came here there was a great deal of travel longitudinally with the tracks on Railroad Street. Since the fire there has not been so much travel there. The travel consisting since that time practically of persons having business with or hauling goods to or from the railroad and these warehouses.

Since a year or two after the fire, travel has been practically for these warehouses, coming and going to them and loading and unloading cars standing on the team track. I think the team tracks were used mostly for the unloading of wood and hay and stuff of that sort. The ordinary stuff was unloaded direct into the warehouses by means of the platforms. I want to qualify my answer in regard to the building south of block 14, when I said that the buildings in front of that block on Railroad Street were extended eighty feet from the property line. I meant to have said that there was a space of twenty feet between the property line and the building that had been let with no buildings on so that the south line of the building would be approximately one hundred feet from the property line.

REDIRECT EXAMINATION.

BY MR. TURNER:

When I said in answer to Mr. Graves about the buildings on Railroad Street being all warehouses, I didn't mean to say that they were all wholesale houses—wholesale warehouses—some of them are devoted to retail trade. The building back of block 14, facing Howard Street, is a retail hardware store. Hughes & Company's store across the street is also a retail store, and so is Holley-Mason's on the south side. Many of the buildings on the south side are devoted to wholesale and retail business.

On the south side of the track, between Howard and Mill Streets, there is a space between the main track and the switch approximately seventy-five feet wide that has been used right along by the public for a great many years. I think it is still an open road.

RECROSS EXAMINATION.

BY MR. GRAVES:

The four retail stores I spoke of cornering on Railroad and Howard Streets, all have their stores front on Howard. They receive shipped goods on the railroad side and have stores fronting on Howard. I don't think there is a retailer on the inside lots. As to the space between the main line and the side tracks on the south side, this space has been frequently used before the fire and after the fire and it is to this day. It is left with the dirt surface. People can leave a paved street when they are close to it, and turn off down there if they want to. I think they drive through there, make quite a convenience of it, between Howard and Stevens. I have recently seen people many times turn off from Howard Street on there going to Stevens Street, just for convenience.

WITNESS EXCUSED.

D. M. DRUMHELLER. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

My name is D. M. Drumheller. I have lived in Spokane continuously since August, 1880. I think the Northern Pacific was constructed through Spokane in 1881. As to the condition of Railroad Street from the time it was platted down to 1889, practically all the travel and traffic from the main part of town went down Howard Street to the track and then down Railroad Street to the depot, backwards and forwards. The street was built on on and off from 1882 up to the fire. I don't know how many buildings there was. Each

block was quite fully covered. I remember one block, Post and Lincoln, on the north side, that was practically covered with buildings of different kinds. On the south side, I don't remember any but two. As far as I know the general understanding was that Railroad Street was a street. It was always considered a street. We always designated it as a street and understood it as being a street. I never owned any property on this street. I don't remember that there was ever any obstruction to the use of the street before the fire except that at one time the railroad company attempted to block up Mill Street, but it was stopped. The railroad company never interposed any objection to the use of the street to my knowledge. I lived from 1885 to 1889 on the corner of Mill and Second Streets, south of the track, and had occasion to cross it every day on Mill Street.

CROSS-EXAMINATION.

BY MR. GRAVES:

Up to the fire I think the business center was not far from Main and Howard, that is, three blocks north of the railroad track. It centered on north and south streets, mostly on Howard. In those days there was a little travel everywhere and anywhere on the right of way; up to the time the town began to build up they usually went as they pleased.

REDIRECT EXAMINATION.

BY MR. TURNER.

People having buildings on Railroad Street used the street to get to and from a building. People living south of the track and further west also used the track

to get down to the neighborhood of their own buildings.

WITNESS EXCUSED.

J. B. BLALOCK. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

My name is J. B. Blalock; I am fifty-six years old. I have lived in Spokane thirty-four years, except about three years I was out of the city—1899, 1900, 1901. In a general way I am familiar with the strip of land marked "Railroad Street" on the plat of Railroad Addition. It was used by the public generally as a highway up till 1889, and was built on from Monroe pretty much up to Howard Street, probably five or six blocks, I should think. It was mostly residences on the south side. They were scattering along. I think perhaps there was a warehouse or something where Jones is. I can't locate the Henry Brook lime and brick establishment. I know he had one. The general understanding and repute in the city as to Railroad Street was that it was a street the same as any other. There was lots of travel on it, there was business there. First Street wasn't opened up, and that seemed to call more traffic there than probably it would have been otherwise had First Street been opened up. I cannot say how many streets were more important than Railroad Street in 1889. Riverside Avenue and Howard Street were of more importance; I don't think that Main was of as much importance as Railroad Street, nor Front. I think Railroad Street had more business on the north side than there was on either side of Main Street, but

taking both sides of Main Street, I suppose it had more business than Railroad Street. Up to the time of the fire in 1889, I don't think that Railroad Street was obstructed in any way other than by the tracks and depot. There was no attempt on the part of the Railroad Company to obstruct or prevent the travel on the street during that time.

CROSS-EXAMINATION.

BY MR. GRAVES:

By the importance of a street, I mean the amount of teams and vehicles and traffic that went over it. There were sidewalks on the north side of Railroad Street at the time of the fire. The sidewalks were in front of the business houses in the block below Post, I guess, I mean west of Post. This was built up solid with business houses. There was the LaVurne Hotel and there was a hotel in there that a Mr. Seaman used to run, but I don't know where it was located; there were saloons and restaurants. To the east of Post I could not designate the buildings. There were some buildings there that fronted the railroad tracks. I do not know whether they were right up to Railroad Street. I know that in a general way there were buildings along that tier of lots fronting the railroad track, and that people in going to them used Railroad Street. To get there between Post and Lincoln they would either go up Howard Street and turn down there or they would take short cuts and go up the best way they could; depend on what part of the street they wanted to go to. I get the impression that it was a public street and that there was a public belief that it was a street from the fact that it seemed to be used much.

I don't remember just when, but I know it was said a long time ago it was dedicated as a street, that was also reported, yes. These two things put together made people think that it was a street.

WITNESS EXCUSED.

THOMAS THWAITE. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

Thomas Thwaite; age fifty-two; live in Spokane. Have lived here since 1884.

I was familiar with the condition of Railroad Street from 1884 to 1893. I had occasion to use that street in my business during that time. I worked in 1886 for Todd, who had a bottling works on that street at Howard. The building faced on Howard, but the back end had a door on Railroad Avenue—a side entrance. They all used Railroad Street—it was a street then. It was built on—had quite a few buildings. In 1889 it was all built on between Post and Lincoln, but not so much between Howard and Post; but there were some houses there; some few buildings, stores. I am speaking of the north side. There were not many business houses on the south side, that I can remember. Taylor and Sharkie were there and Henry Brook, but I didn't go up there very much. As to the general character of the buildings on the streets: They were one and two story buildings, used for lodging houses. I think there was a hotel, a lunch counter, and I think a couple of saloons—two or three saloons, and a fruit stand. I don't remember that the street was obstructed in any way in 1889. I never heard of any

effort made by the railroad company or any of their agents to prevent the use of the street by the public during any of that period. The street was generally used from Stevens to Jefferson Street. There were houses on the south side at the corner of Jefferson. There were sidewalks in front of the business houses, and hitching rails to tie horses to. I remember only one hitching rail—that was across from the depot.

CROSS-EXAMINATION.

BY MR. GRAVES:

The buildings were in a uniform line. I cannot say whether they came up to the street line or not, except it would look as if they came right up to the street. I don't know the limits of the street. I just supposed the buildings came up to line. The hitching post opposite the depot was in front of a saloon, so that fellows could come up there and tie their horses and go either to the depot or to the saloon. It was a fairly popular place in those days. Some of the travel stopped there.

WITNESS EXCUSED.

GEORGE TURNER. Called and sworn on behalf of the plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. POST:

George Turner. I am plaintiff in one of these cases. I came to Spokane August 1st, 1884. I remained then in the city about ten or twelve days and went to Yakima and lived there until the next spring; then I returned to Spokane, and have lived here ever since.

When I came here in 1884, Railroad Street was built on to some extent on both sides. I remember very well the first building that I saw when I got off the

train was the Sprague House. It stood facing Railroad Street, and there were more or less of business buildings on the north side of the street, and, as I remember it now, I think there were some buildings on the south side, although very sparse. The street was then being used by the public as a street, that use and the condition of buildings on the street continued up until 1889, at the time of the fire. At that time the north side was pretty well built up. I have a mental photograph of the north side of the street in my mind, but I could not outside of one or two hotels identify probably a single building that stood on the street, but I know that it was pretty well built up from about Lincoln Street up to the neighborhood of Howard Street, with probably a little building east of Howard Street. Railroad Street was then used generally by the public as a thoroughfare as well for reaching the depot, which was down on Post Street as in reaching these buildings on each side of the street, for the purpose of ingress and egress, and also for the passage of vehicles east and west off Railroad Street.

I could not identify the particular point where the traffic commenced or ended on the street, but I will say, generally, from about Stevens Street on the east to Lincoln Street on the west. It was used as a street continuously. It is very hard for me to undertake to even approximate the distance of the buildings on the north side of the street from the second track. There was a very wide traveled street between the railroad tracks and the frontage of these houses, I should say certainly more than one hundred feet, but probably not much more than 100 feet. Knowing that the rail-

road track was a hundred and twenty-five feet from the north line of Railroad Street, my recollection would be that these buildings were probably 125 feet back from the railroad track. They might have been more and they might have been less. I don't remember anything about sidewalks or hitching posts. My property is lots 1 and 2, block 13, Railroad Addition. I bought it in 1900 or 1901. I have built on my lots an office building and a theatre, covering the whole ground. The office building is six stories high, fire proof, and with the theatre, cost me between two hundred and ninety and two hundred and ninety-five thousand dollars.

As to the way in which my property would be affected by the proposed scheme of track elevation—I have seen the plans in Mr. Cooper's car, and if the railroad tracks are elevated 15 or 16 feet, as shown in the plans, I believe that the theatre building, which is the one nearer to Railroad Street, will be rendered practically useless for theatrical purposes. That would come from the access of noise and jarring by reason of the elevation of the tracks, and the increased use of the tracks which it is contemplated to put them to. My office building would be much more seriously affected than it is now, by the increased noise and jarring as well as the increased radius dirt and dust, cinders and deleterious substances and matter would be thrown into and onto it, and it would make it very undesirable for office purposes. I consider also that the building of a tunnel, such as these plans contemplate, over Howard Street, next to my building, would very seriously injure the value of property.

Another attempt was made in 1908 by the Railway Company to raise the tracks along Railroad Street. I think probably Mr. Norman and I were the principal protestants at that time, we stirred up most of the opposition to it. At that time I was present at several meetings before the city council at which Mr. Cannon representing the railroad company appeared and I heard his statements there. I remember his statement that the ordinance had been prepared by him. He was urging the passage of the ordinance by the council, and stated that the original had been presented by him, and I think he said, prepared by him; if not by him certainly by some of the legal force of the railroad company. And he went into many details about it; among other things he defended what then appeared in that ordinance and now appears in this, the mandatory character of the ordinance; said that the railroad company would not accept it nor obey it unless it was mandatory in character. He said they wanted it in that way in order that it would be invulnerable to injunction proceedings in a general way. He said the owners of the Columbia Building and the Spokane Hotel were threatening them with an injunction. I think he presented to the council both the street grade ordinance and the franchise of the Spokane, Portland & Seattle Railroad, authorizing it to come in and use these tracks over the raised grade, and as I understood it, he stated at some of the meetings of the council that the thing was desirable from their standpoint for that reason, and because it gave them a better grade into the city than they had now. The Mr. Cannon I refer

to is E. J. Cannon, attorney for the Northern Pacific Railway Company then and now.

The foregoing testimony was objected to and admitted by the court subject to objection.

After I had appeared before the city council a number of times, I had occasion to go to New York while this matter was pending before the council and I got a telegram from Mr. Williams who was in my office looking after my business here, that Mr. Elliott wanted me to stop over in St. Paul when I came home. I did so and had a couple of conversations with Mr. Elliott about this in which Mr. Elliott undertook to impress upon me that this raise of the grade would be an advantageous thing for the city, and requested that I withdraw my opposition to the ordinance then pending before the city council. I told him that I would like to accommodate him and the railroad company, but that my convictions that this was a monstrosity which would forever deface the city was so strong that I could not undertake to withdraw my objections. This conversation occurred in his office, and he came down to the railroad train the next morning when I was leaving for Spokane and renewed the conversation with me along the same lines, but I persisted in my declination to cease my opposition to the ordinance. This was in 1908.

When the present ordinance came up before the council I never protested to that body, never appeared before them. In fact during the period that I was in the city while that ordinance was pending, the hearings were secret between the city council and the agent of the railroad company. I think after the mem-

bers of the city council and the railroad company had got the ordinance to suit themselves, they called in the public to be heard about it, but I wasn't here at the time. I was here when Mr. Cooper first came here for the purpose of endeavoring to secure the passage of this second ordinance, and he requested me to visit him in his private car, which was then standing at the Northern Pacific depot. I went up there and discussed the matter in a general way with him. He told me he came here in the interest of grade separation; that he had the plans of the separation with him, which he exhibited to me to some extent; and that he was going to stay here until the matter had been threshed out; and he wanted to assure me and to assure every other property owner that if any were injured they would be adequately compensated for their injury. That is about the extent of our conversation at that time. Mr. Cooper's title, I think, was Assistant to the President of the Northern Pacific Railway Company. I wrote several letters to the newspapers about this matter. I don't remember that I addressed the City Council. I may have done so, but I have forgotten it if I did.

CROSS-EXAMINATION.

BY MR. GRAVES:

I was attorney for the City of Spokane in the Mill Street crossing case, brought in the Circuit Court of the United States for this District, and was familiar with the law issues in that case, and have been familiar with the street dedication on the plat of Railroad Addition ever since 1892, and have at all times understood the proper status of Railroad Street as it appears

upon the plat of the Addition. I was one of a committee that signed a circular sent out in 1908. My recollection is not very distinct, but I think I wrote it. I don't know for sure.

Mr. Graves then read from the circular as follows:

"The only possible argument in favor of granting the right demanded by the railroads is the danger from maintaining the tracks of the Northern Pacific Railway in their present conditions. But that condition cannot long be maintained. It is onerous and expensive to the railroads and if the people of Spokane do not weakly yield to the present project of dismembering and disfiguring the city and rendering a great part of it uninhabitable, it will not be long before the Northern Pacific Company will itself devise another way of getting through the city and of utilizing its very valuable right of way property for some other and more desirable purpose."

My building comes to the south line of the lots, then there is a space of about 16 feet occupied as a driveway, and beyond that, to the south of my building, is the Hughes & Company building. The present building was erected last year, but Hughes & Company did business there in an old building prior to that, and were doing business in the old building when I bought my lots. I cannot say how long the old building was there, but it was there before I bought.

The south line of my building is about 125 feet north of the center line of the main track, then south of my building at a distance I say of about 16 feet, commences the Hughes & Company building, and this building extends probably to within 15 or 16 feet of

the main track; the width of the building is probably between 80 and 100 feet. I think the present building is three stories; it is about two-thirds as high as my theatre building and half as high as my office building. The building that was there when I bought, and on the site of which Hughes & Company rebuilt last year, was a one story, frame building, with an approach in front of it, between it and the railroad track; I think it was used like the present building, with a front on Howard and with a platform on Railroad Street, from which they load and unload the cars.

While it is true that the character of the proposed structure is to be concrete walls on the north and south sides of an eighty foot strip, with that eighty foot strip filled up with dirt and rock, still it is an artificial structure, and I don't think any artificial structure can be filled as solidly as the earth itself. I don't think it would be possible to make that fill with rock and dirt and beat it down so as to make it substantially as solid as the ground on which the tracks now rest. This artificial structure will cause more vibration and more noise, and, of course, the noise emanating from an elevation like this would be carried to a greater distance than noise emanating from the earth. My buildings will be injured by these two things, together with the increased use to which that elevated structure is to be put. The noise I refer to is the passing of trains, the ringing of bells, blowing of steam and whistles. I don't think the fact that there will be no traffic travel over this elevated structure will obviate altogether the necessity of ringing bells and blowing whistles. They are beginning to

approach the depot when they get across Howard Street, and I apprehend they would have to give their warnings to other trains. The elevated structure would obviate the necessity of warning travellers of the approach of trains. From the time I built my building, up to the present time, smoke from the engines has to some extent, come into my building; I apprehend considerable more will come in if this elevated structure is built. Some of the smoke is now stopped by the Hughes & Company building, it is true, and that if this building were not there I would probably get more; but if the building were not there, and the railroad continued to be operated along the center of its tracks, without a switch on the north—and there would be no necessity for it, if that were open as a street—I would not get nearly so much smoke and dirt and noise as I would from an elevated train up there. I would get all the smoke from passing trains that travelled northward to the property line if the Hughes building were not there, but the railroad use, I imagine, would be confined to the main track, which would be 125 feet from my building. If the Hughes & Company building was not there, some smoke would come to my property and some would be dissipated before it got to me, and seek the ground. Undoubtedly if Hughes & Company were not there, and the track was raised 15 feet, by the elevation, more smoke would reach me. It is impossible to say how much more, but I think that it would certainly be a considerable more. Yes, this thing is an apprehension on my part, but it is an apprehension based on common sense, and the considerable ex-

perience with dirt and dust and cinders there at the present time. I have had to calcimine and redecorate my rooms on the third and fourth stories nearly every year for my tenants. I take the position that Hughes & Company have no business where they are; they are in Railroad Street. The grade of Howard Street is not affected by the proposed change in front of my property. The change in grade commencing at a point just south of my building.

REDIRECT EXAMINATION.

BY MR. POST:

Q. Judge, since the big fire, I wish to ask you what you have noticed about Railroad Street being used for the purpose of travel generally or any part of it?

A. Well, after the fire the necessities of the people of Spokane was so great, material was coming in here for the building of the town to such an extent that Railroad Street was more or less obstructed by common consent arising from the necessities of the case, and the railroad company was permitted to put up a very long warehouse, extending, I believe, from Post in beyond Mill Street, closing Mill, which they had kept open for quite a number of years. The right of way was more or less littered up with freight of various kinds that would be unloaded upon it. I don't think, unless it might be the building standing in front of my building that there was any attempt to obstruct the street by the railway company for a number of years. That building I think was put up not very long after the fire, and then from time to time thereafter, several years thereafter, an oc-

casional structure was put up by renters, with the authority of the railroad company, on the north side of the railroad, but it has only been of late years—the last six to ten years,—that they have undertaken to occupy the entire north side of the street to the exclusion of the property fronting on the street. There never has been any obstruction at all on the south side, other than the railroad tracks on the south side of the street. That has always been open for travel, so far as it can be travelled consistently with use of the railroad tracks, and my recollection is that there has been only one switch track to the south, certainly so in the blocks between Stevens and Mill Streets, and possibly further west, leaving the entire width, almost, of the street there for public travel; and that is the case up to this time. The south side of the track, for the purpose of light and air and access, has been open continuously all the time, and is open at this time.

At the time the former ordinance was up for passage, in 1908, I attended a number of meetings before the city council at which Mr. Cannon was present, and I took the position, very emphatically, that Railroad Street was a public street; had taken the position before that, long before that time. I want to make one observation concerning that circular that Mr. Graves called my attention to, and in explanation of our not making any mention of its being a street in that circular. It had been generally discussed, I don't know but that I suggested it prior to that time, that the railroad company could gain by allowing that street to remain there, but con-

fining its width to one hundred feet and using the balance of the property on either side for their own purposes and removing their tracks elsewhere, and I suggested that if they had any fear of the right to do that, that I would go to Washington and endeavor to get an act of Congress specially authorizing them; and this had been so generally discussed that I didn't think at the time that circular was made of saying anything about that feature of it. That plan was to move the tracks elsewhere and let Railroad Street, narrowed as I have described, remain. The railroad company to have the use of the land on either side, not for railroad purposes, but for sale. I took the position that they could sell that land for enough to pay them to get a right of way outside of the city's streets and retail buildings.

RECROSS EXAMINATION.

BY MR. GRAVES:

The distance between the south line of the warehouses on the north side of the track and the south side of the right of way, is, I should say one hundred and twenty-five feet. I don't think this warehouse district comes closer than twenty-five feet of the center of the main track on the north side. There is a sidetrack all along the south side of the right of way running along immediately adjoining the buildings on that side. When I say the rest of the street on that side has been opened, I mean that it has been opened in the sense that it has been left there for public travel if anybody wanted to travel it. It has never been occupied with anything, and has been travelled, and I have travelled it myself.

WITNESS EXCUSED.

C. J. CRAIG. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

C. J. Craig; sixty-one years old; contractor and builder; have lived in Spokane since 1882. I lived in the west part of the city in early days—between Oak and Elm. I was familiar during that time and up to the fire in 1889, and since the fire, with Railroad Street. From 1882 to 1889 the street was generally used as a street, that was principally used by people coming from Browne's Addition into the city here. I used it nearly altogether. I would come up Railroad Street and then take a cross street to go down town. I used to see the other residents coming the same way frequently. The north side of Railroad Street was pretty well built on. There were a few houses on the south side. We didn't use Railroad Street very much after the fire. The whole city was burned up and we travelled most any way. Up to the time of the fire, Railroad Street was not obstructed in any way, except by the tracks and the depot. There was no effort to prevent the public from using the street.

There were not so many people living in Browne's Addition ten,—there were a few. They generally travelled up the tracks the way I have said.

WITNESS EXCUSED.

FRED HARRINGTON. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER.

This book is the fire map of the city of Spokane for the year 1891. It is the plat book that was in use by the insurance companies in identifying risks that year. Railroad Avenue is shown on page 7—south Railroad Avenue. Page 4 shows the north side. The colored spaces represent buildings. Page 13 I think also shows part. Page 7 shows the south side between Stevens, Howard and Washington. Page 6 also shows part of the north side. This map shows porches in front of some of the buildings out on the avenue.

The plat was then admitted in evidence, marked PLAINTIFFS' EXHIBIT 13.

MR. TURNER: We can probably substitute a plat later showing what this plat shows.

MR. GRAVES: We can put in photographs of these pages that relate to the matter.

WITNESS EXCUSED.

H. A. HOLLAND. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

H. A. Holland, thirty-two years old; residence Spokane. Am a stockholder in the H. A. & L. D. Holland Company, one of the plaintiffs here. Have lived in Spokane twenty-nine years.

The concrete retaining wall, for the dirt fill has been built in front of my building. It comes to within fourteen or sixteen feet of the building. My building is on an inside lot. The building is used by W. P. Fuller & Co.; deal in paints, oils and plate glass.

When the structure contemplated by the railroad company is completed it will come, I should say, a little higher than the floor of the second story. This structure will prevent us from getting into our building any way, except from the alley in the rear. It will shut out the light from the lower story. Our building is 50 by 130 feet. I should say that a building like ours would be worth between twenty-five and thirty thousand dollars. I recall the condition of Railroad Street between 1881 and 1889. It was used by the public generally as a street. I can't remember as to the buildings, but there were some buildings on it. There were buildings between Post and Lincoln and between Lincoln and Monroe. I remember those two blocks better than the others because I went quite often to the depot. The street was travelled east as far as Sevents Street and west to Monroe. I do not remember any obstruction in the street up to the time of the fire. I don't know anything as to buildings on the south side before the fire. The street is still open on the south side, in front of our property, except the railroad track. There is a switch track on the south side in front of our building, then there is seventy-five or eighty feet between this track and the next one, and this space has been used by the public at will as a street during all of this time.

CROSS-EXAMINATION.

BY MR. GRAVES:

My property is lot 4, block 29. A track runs right along in front of it. This track used to be planked. I don't know whether it is planked now or not. I presume the track has some value for the property.

The property is rented to men who use the track for loading and unloading their stuff. They get a large majority of their stuff that way. I presume they get a lot of things in a local way, I don't know just what. W. P. Fuller & Co. have been in the building since it was built; I believe the company built it for them. They use the railroad to get up to their place in front occasionally, a great many times. We used to have an office next door to them. They drove up with a team of horses to take things off the platform and off the cars,—off both. They have a small platform on the rear at the alley, used for loading and unloading. They have a heavy platform running out from this building on which they load and unload into the cars.

The witness then identified his building on the plaintiffs' Exhibit 2 as the building marked "W. P. Fuller" thereon.

WITNESS EXCUSED.

H. M. STEPHENS. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. POST.

I am an attorney at law, and head of the legal department of the city of Spokane. I am familiar with the issues in this case only in a general way. I have read the bill of complaint; I am not sure as to the answer. I was here and heard Judge Turner's opening statement of the issues. I remember the case of the Northern Pacific Railway Company against W. S. Ely, J. J. Browne and others, being the case that was tried in this county in 1899 or 1900, and

went to the Supreme Court, and is reported in the Washington reports, and then went to the Supreme Court of the United States. I don't remember the volume in which the case is reported. I was attorney for the railway company in the state courts.

Q. That was an action so far as J. J. Browne was concerned, to quiet title—

MR. GRAVES: I assume—in fact I know that the reports state what the cases are.

MR. POST: All right, it is conceded the reports state what the cases are.

WITNESS. J. J. Browne was a witness in that case. He has since died. I cross-examined Mr. Browne when he testified in that case, as attorney for the railroad company—I prepared the bill of exceptions when the case was taken to the Supreme Court. The testimony of Mr. Browne is set out in the bill of exceptions in narrative form. It is brief, but supposed to cover the substances of his testimony in relation to the agreement made between himself and Mr. Sprague, the general superintendent of the Northern Pacific Railroad Company, in relation to the platting of Railroad Street in Railroad Addition, and Browne's platting of Railroad Street in Browne's Addition.

That part of the bill of exceptions referred to which relates to the testimony of J. J. Browne was then admitted in evidence, subject to objection, and was read by Mr. Post, as follows:

“These defendants offered and introduced evidence tending to show that the original townsite of Spokane Falls, now Spokane, was laid out and platted in

the year 1880 by this defendant and others. That in January, 1881 the Northern Pacific Railroad Company aforesaid, by John W. Sprague, General Superintendent thereof, laid out and platted a part of Section 19, Township 25 north of Range 43 E W M immediately abutting on the original townsite on the south thereof and in the heart of said town, now city, an addition, called Railroad Addition to Spokane Falls; and that Browne's Addition to Spokane Falls, laid out and platted in 1883, abutts on Railroad Addition aforesaid on the west end thereof, and that it was orally agreed between the defendant John J. Browne, and said Sprague, as general superintendent of the Northern Pacific Railroad Company aforesaid, at the time of platting said original townsites, and before said platting of said Railroad Addition by said railroad company, as to how various streets should be laid out in said original townsite, said Railroad Addition and said Browne's Addition, when platted, the center of said Sprague Street being the dividing line between the original townsite and said Railroad Addition and named after John W. Sprague, General Superintendent of the Northern Pacific Railroad Company, and it was especially agreed, after said time that the right of way of the Northern Pacific Railroad Company to said Section 19 should be dedicated on the plat of said Railroad Addition as Railroad Street and should be 225.7 feet in width; the remainder of the land abutting on said strip of 225.7 feet of width on either side thereof should be divided into lots and blocks and that said John J. Browne, when he platted Browne's Addition should leave a

street to be called Railroad Street in width 200 feet, an extension of Railroad Street in said Railroad Addition on the west, subdividing into lots and blocks the remainder of his said land. That the plat of said Railroad Addition filed in January, 1881 was prepared and executed in accordance with said agreement and understanding and subdivided into lots and blocks, all of said original railroad right of way except the strip of land 225.7 feet in width which is named Railroad Street and in the center of which was originally located the tracks of the Northern Pacific Railroad Company and the said tracks have remained and been used in the same place ever since; that in 1883 when said John J. Browne platted said Browne's Addition he left for use of said Northern Pacific Railroad Company, in accordance with said agreement, a street called Railroad Street two hundred feet in width, an extension of Railroad Street in Railroad Addition, as provided by said agreement, subdividing the remainder of said land into lots and blocks. That said Northern Pacific Railroad Company sold in 1881—."

CROSS-EXAMINATION.

BY MR. GRAVES:

My recollection is that that suit did not involve anything in Railroad Addition. Browne had platted his homestead up to within 100 feet of the center of the track on both sides; that is he platted 200 feet of the four hundred foot right of way the railroad company claimed, and that is what was disposed of by the court. The suit was brought by the company to quiet its title to the 400 foot right of way. The action was to get possession where parties were in possession, and to

quiet title where the company was in possession, to the 400 foot strip. My recollection is that that suit covered nothing between Division and Cedar Streets; and I apprehend these are the east and west lines of Section 19. Section 19 was left out of the suit—this is the section in which Railroad Addition is platted. Where Railroad Addition is, my recollection is that the company had sold lots on one side, covering part of the right of way; they did not bring a suit to get back what they sold.

WITNESS EXCUSED.

JAY LAWYER. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

My name is Jay Lawyer. I have lived in Spokane for twenty years. In a way I am acting as the agent for W. H. Kiernan and wife, parties to this action. I am Mr. Kiernan's business partner; he owns this property and it is looked after in the office. Mr. Kiernan is not in the city now. I am fairly familiar with the conditions this property will be left in by the erection of the proposed structure in Railroad street. I should say the structure will be within probably fifteen feet of the buildings. The structure will be about fifteen or sixteen feet above the ground. I should imagine it would come about on a level with the second story floor. As a result of the building of the retaining wall I have lost a tenant since the work started. He said he went out because of the retaining wall in front of him. This photograph is about right—the building shown on it is the Kiernan building.

The photograph was then admitted in evidence without objection, marked PLAINTIFFS' EXHIBIT 14.

CROSS-EXAMINATION.

BY MR. GRAVES:

The ground floor of the Kiernan building is on a level with the platform. The platform is on a level with the cars; that is about three or four feet above the railroad track.

I have never measured the retaining wall. I couldn't say whether it was fifteen or seventeen feet high. I have an idea the ceiling of the first floor of the building is about sixteen feet—fourteen feet. The photograph was evidently taken from the ground looking toward the building, so that in the picture it looks higher than it really is, if it was measured through straight across.

The Beardmore Transfer Company occupied the building. They moved into the next room back of the track. They gave as a reason for moving that they didn't like that wall there, and had lost a subtenant on account of it, and moved out; they lost their subtenant, a machinery company, they couldn't handle their machinery and moved out.

WITNESS EXCUSED.

C. A. FLEMING, City Clerk of the City of Spokane, was called and sworn. He identified a paper entitled "An ordinance requiring the Northern Pacific Railway Company to elevate its railway tracks and requiring the construction of subways, and affecting streets, avenues and alleys," being file No. 17,796 in his office. He also identified another paper as a part of the files in his office, being entitled "An ordinance

granting the Portland and Seattle Railway Company a franchise for a single or double track railway, and designating crossings, subways, etc.," being office file No. 17,795.

These papers were admitted in evidence, subject to objection, and marked PLAINTIFFS' EXHIBITS 15 and 16, respectively.

CROSS-EXAMINATION.

BY MR. GRAVES:

As to the two rolls, Plaintiffs' Exhibits 15 and 16, there appears to be two typewritten ordinances in each roll. One of them is the ordinance as introduced. The ordinance was then referred to the committee of the whole. The other copy in each case is as amended in the committee of the whole. These amendments were not reported back to the council, however, and the ordinances were reported back to the council from the committee of the whole only for the purpose of having them placed on file. Nothing further was ever done with them. The amendments were informally agreed on during the sessions of the committee of the whole, but never formally adopted or reported out; they are on file merely because they were attached to the original ordinances.

Whereupon, it was agreed, that the parties might read such portions as they desired from the records of the proceedings before the City Council, when the ordinances, Plaintiffs' Exhibits 15 and 16 were under consideration; the records of such proceedings being identified and marked PLAINTIFFS' EXHIBITS 17, 18 and 19, and admitted subject to objection.

C. A. FLEMING. Recalled, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

WITNESS. These papers you hand me are a part of the files in my office, a part of the files of the City Council of Spokane.

MR. TURNER: We desire to read this notice and have it go into the record, with respect to the accompanying papers.

"To the Honorable Mayor and Commissioners of the City of Spokane, Washington, and to H. M. Stephens, Esquire, Corporation Counsel: Gentlemen: You will please take notice that an action has been brought and is now pending in the District Court of the United States in and for the Eastern District of Washington, in which H. J. Shinn and Phoebe Shinn are plaintiffs and the Northern Pacific Company is defendant, being No. 1582 in equity, for the purpose of restraining this defendant from elevating its tracks or changing the grade thereof in the City of Spokane, Washington, in accordance with and under the terms of that certain Ordinance of said City, known as No. C594.

This notice is given you under and pursuant to the terms of Section 20 of said Ordinance and you, said H. M. STEPHENS, Esquire, as CORPORATION COUNSEL, are hereby invited to participate in the defense of said action and are hereby furnished copies of the pleadings herein." Signed by Mr. Cannon as attorney for the Northern Pacific, Division Counsel for the Northern Pacific Railway Company, to which is attached the pleadings in this case. I don't desire them to go in. There are similar notices in each one of these four cases.

THE COURT: I presume counsel will admit similar notices were given in the other cases without encumbering the record.

MR. CANNON: Yes.

MR. TURNER: To which the corporation counsel responded: "Herewith transmit what have been furnished me as copies of the bills in equity and notices in accordance with Section 20 of the Northern Pacific Grade Separation Ordinance, in the four cases above referred to, together with copy of answer in the Turner case.

Mr. Drain has gone over the complaints and informs me that they are practically all alike. Judge Richardson has examined one of these bills and the answer in the Turner case. So far as I can see, the city is interested in but one question and that is the allegation that the ordinance is void because it does not make provision for the ascertainment and payment of damages before work is done.

We have written Mr. Cannon, Division Counsel of the Northern Pacific, requesting that he keep us advised on that question, and that we will be glad to render him any assistance in connection with that question.

The allegation is made that "Railroad Street" on the plat of Railroad Addition is a dedicated street. This is denied in the answer in the Turner suit. We are informed that all the other answers are the same as the answer in the Turner suit.

The plat of Railroad Addition purports to reserve "Railroad Street" for the use of the tracks of the railroad. It does not seem desirable for the city to take

the position that "Railroad Street" is a public street. That position would be inconsistent with the ordinance providing for the separation of the grades. Unless instructed to the contrary we shall not appear in either of the four suits mentioned, on behalf of the city. Very truly yours. (Signed) H. M. Stephens. This is dated February 26th, 1913.

We desire the notice of Mr. Cannon in each of these cases and this response of Mr. Stephens to go in evidence.

MR. GRAVES: We do not object. We have been doing everything we know how to get them in; we can't get them in here unless the court orders it.

MR. TURNER. Mr. Post suggests it is desirable also to put in the letter of the City Council referring this matter to Mr. Stephens: (Reading) "Spokane, Wash., February 27th, 1913. Mr. H. M. Stephens, Corporation Counsel. Dear Sir: At the Administrative Session of the City Council held this morning it was ordered relative to the cases Geo. Turner and Bertha Turner vs. N. P. Railway Co., W. H. Kiernan and Christine B. Kiernan vs. N. P. Railway Co., H. A. & L. D. Holland Co. vs. N. P. Railway Co. and H. J. Shinn and Phoebe Shinn vs. N. P. Railway Co., and the allegation in regard to 'Railroad Street'—that you be instructed to advise the city council from time to time of any case in which you deem it necessary or desirable that the City be represented. Yours truly, C. A. Fleming, City Clerk."

MR. TURNER: Q. Are these also files of the City of Spokane?

A. Yes, sir.

MR. TURNER: I offer this and read it and let it go in evidence that way: (Reading- "Spokane, Wash., March 26, 1913. Mr. H. M. Stephens, Corporation Counsel. Dear Sir. At the Administrative Session of the City Council held this morning, the attached communication from the Northern Pacific Railway, by Edward J. Cannon, Division Counsel, and Graves, Kizer & Graves, of counsel, relative to the matter of grade separation, and the matter of intervention by the City in the suits brought by Judge Turner against the Railway Company to stop the project, asking that the city bring suit in the Federal Court requiring the Railway Company to proceed, or as a third alternative, that the commission pass a resolution holding that the action brought by Judge Turner is within the provision of Section 20 of the ordinance requiring grade separation, to act as an extension of time within which to comply with the order of the Council requiring separation of grades, was referred to you. Yours truly, C. A. Fleming, City Clerk."

"March 25, 1913. To the Honorable City Commissioners, Spokane, Wash. Gentlemen: Following your suggestion made in our meeting with you this morning, relative to grade separation, you ask that we write you of our views in order that you may take up the matter in a regular way.

"Judge Turner in his several suits against the Railway Company demands the following relief:

"*First.* That the Railway Company be enjoined from constructing, building or maintaining the elevated structure contemplated or any structure of a similar kind or character.

"Second. That if the defendant shall have constructed and built such structure in Railroad Street, the court, as part of its final decree, issue a mandatory injunction requiring and compelling the defendant to remove said structure.

"Third. If the court shall consider that the defendant is entitled to build and erect said structure, that the court issue a perpetual injunction restraining it from doing so until all damages and compensations are ascertained and paid.

"It is our opinion that the Railway Company ought not to take all the chances of expending large sums of money in separating the tracks from the streets, which money will be a complete loss if Judge Turner succeeds, and other moneys which must then necessarily be expended in tearing down the structures and restoring the Railway Company's right of way to its present condition. It appears to us therefore that we should not go on and expend these large sums of money, and that it would be advisable to secure your consent either to delay the work or that you bring suit in the Federal Court requiring us to proceed. It may well be held that the situation in which the company finds itself with suits brought against it attacking its right to do the work, and attacking the power and motives of the commissioners in passing the ordinance, would excuse the Railway Company from proceeding under the ordinance until the final determination of the suits.

"It would seem that the city should act one way or the other—either consent to delay, or bring suit to enforce action by the Railway Company; or there

is a third alternative, the language of Section 20 of the ordinance recites, 'that unless prevented by—legal proceedings—injunction order—or other process of a court of competent jurisdiction,' the work shall proceed. Your commission might well pass a resolution holding that the action brought by Judge Turner is within the above provision, and this would place the Railway Company in the position where the delay, growing out of the litigation, would not constitute a violation of its agreement with the city and neither the city nor the Railway Company could take advantage of this delay.

"Will you please give the matter your consideration and advise us as the result of your deliberations?"

"Very respectfully,

"EDWARD J. CANNON,

"Division Counsel.

"GRAVES, KIZER & GRAVES,

"Of Counsel."

The first paper I read is addressed to Mr. Stephens. I now will read his reply to the City Council, as follows: "March 28th, 1913. Subject: Clerk's file No. 26130—N. P. Grade Separation. City Council, City. Gentlemen: Re above subject, in reply to letter of your clerk of the 26th instant, and letter of Mr. E. J. Cannon and Messrs. Graves, Kizer & Graves, beg to say that do not see any necessity of action by the Council at this time. The City is performing its part of the contract as and when provided in the ordinance (C594). Section 20 of the ordinance is as follows: 'Said railway company shall begin the work by it to be performed under the terms of this ordinance on or

before October 1st, 1912, and thereafter diligently, continuously and in good faith prosecute said work until the separation of grades required by this ordinance is completed, said separation to be completed on or before October 1st, 1915, unless prevented by weather conditions, strike or strikes, or legal proceedings, injunction order, or other process of a court of competent jurisdiction, and said railway company shall give notice in writing, to the corporation counsel of said city, of the institution of legal proceedings or the pendency of any strike or strikes; and said city shall thereupon have the right to intervene in any suit or proceeding and move for a dissolution of injunction or restraining order, or for any other proper order, remedy or relief.' The railway company has not been prevented by legal proceedings, injunction or otherwise from proceeding. The letter of Messrs. Cannon, Graves, Kizer & Graves does not set forth any good reason why the city should take any action at this time. Letter of Messrs. Cannon and Graves, Kizer & Graves herewith returned. Very truly yours, H. M. Stephens."

Witness then identified as part of the files of the City Council of Spokane, the following paper, read into the record by Mr. Turner, subject to objection:

"January 15th, 1912. To the Honorable The City Commission of Spokane, Washington. In compliance with the demand of the City that the Northern Pacific Railway Company separate its grades from the street grades within the business district of the City, said Company has prepared a plan and herewith submits an ordinance setting forth the details of said plan so

far as it affects the street crossings, also the terms upon which said Company is prepared to comply with the demand referred to. The Company now awaits your further pleasure in this matter. Northern Pacific Railway Company, by Thomas Cooper, Assistant to the President."

The ordinance referred to in the foregoing letter of Mr. Cooper was then admitted in evidence, subject to objection, and marked PLAINTIFFS' EXHIBIT 20.

The Court then admitted in evidence, subject to objection, copy of an ordinance applied for by the Northern Pacific Railway Company, permitting it to make a connection with the Spokane, Portland & Seattle Railway Company—the same being marked PLAINTIFFS' EXHIBIT 21.

WITNESS EXCUSED.

THOMAS A. GERAGHTY. Called and sworn on behalf of plaintiffs, testified as follows:

DIRECT EXAMINATION.

BY MR. TURNER:

My name is Thomas A. Geraghty, I live in Spokane, and am employed as a reporter on the Spokesman-Review, a daily newspaper of this city. I have been with the paper about two years. In November, 1911, when Mr. Cooper came here, I was assigned to keep track of the progress made between him and the City Council in the consideration of the grade ordinances. I was not present at the first meeting between the City Council and Mr. Cooper, but I know they walked over the line. They examined the plans, as they afterwards told me at the city hall; examined the plan submitted by the railroad company, went over different details

of the proposed grade separation. Later, some time in January, the City Council set some public hearings for the property owners, at which Mr. Cooper was present. At these hearings the property owners expressed their views as to the proposed improvement, and usually Mr. Cooper arose towards the close of the meeting and expressed his opinion as to the complaint made by the property owners. There were a few of those meetings, probably four or five in all, which I reported for the paper.

MR. TURNER. Before you get to those public hearings, do you know of the secret hearings between Mr. Cooper and counsel for the railway company and the City Council?

A. Well, there were probably two or three that were called "conferences" in the Mayor's office, at which the reporters were permitted, but no property owners or other representatives of the public. I think Mr. Cannon was present at one or two of these, and some of the preliminary details of grade separation were discussed, and when a certain stage of the understanding between Mr. Cooper and the City Council had been reached, the public hearings were held at which the property owners expressed their views. My recollection is that the details of the grade separation, as agreed upon between Mr. Cooper and the City Council and submitted at these public hearings, underwent very few changes. After the public hearings were held, the City Council held another conference and went over the details, step by step, and they made their statement to Mr. Cooper of what they wanted and Mr. Cooper replied thereto with a statement as to what

changes he would consent to accept; but the general draft of the ordinance differed not a great deal from what they had previously discussed before the public hearings began. The ordinance was adopted substantially as agreed on in these private conferences.

At one session they barred the reporters, and the Commissioners had occasion to leave the room for a morning session of the Council, and on their return, of course, the reporters entered. The question was then finally put up to them, as to whether the reporters should be permitted to remain or be thrown out, and they finally consented for the reporters to stay.

The witness then identified a copy of the Spokesman-Review, containing a report of a hearing held before the City Council January 26th, 1912, as having been made by him, and being correct. Mr. Turner then read from this paper as follows, subject to objection:

"Mr. Cooper said that he hoped his words of the day before were not taken to mean that the plans were fixed and unalterable.

"These plans were formulated after discussion with the members of the city council and changes were made at your suggestions," he said. "Other suggested changes are held for further consideration in the hope that an amicable agreement can be reached.

Road Insists on Few Things.

"However, there are a few things that we shall insist upon which, in our judgment, are irrevocably fixed. We shall insist upon a mandatory ordinance placing upon us by order of this council the burden of undertaking this work. We shall never consent to the insertion to such ordinance a provision such as that con-

tained in the Milwaukee franchise, as the two propositions are not alike, and we are not seeking a franchise. You can force grade separation along certain lines, but in the case of a new franchise you can make your own terms. The Northern Pacific will not accept a franchise with the Milwaukee provision. The other point that we shall insist upon is the three rows of posts. Other suggested changes we will consider and try to work out in the best way possible.

Bernard Street Unreasonable.

"Before I left St. Paul we took up the question of opening Bernard Street and talked it over at length with Mr. Elliott and the engineers. We found that we could not consent to it. Again it was presented in modified form after I arrived in Spokane, but after going into the matter in detail I found that it was impracticable. I think it is an unreasonable request and am inclined to believe that if it is inserted in the franchise the company will not accept it and tell you to go into the courts and get what you can."

The whole of the paper was admitted in evidence and marked PLAINTIFFS' EXHIBIT 22.

CROSS-EXAMINATION.

BY MR. GRAVES:

I knew Mr. Cooper was coming here the first time, because when the grade separation matter first came up in September, 1911, Mr. Elliott, the president of the company, came here and had a conference with the City Commissioners in the office of the city attorney. This was a secret meeting, behind closed doors, I am informed by a newspaper reporter who was present—Mr. Ford. At that time the paper announced that

Mr. Elliott would send Mr. Thomas Cooper here in October, and Mr. Cooper arrived about the middle of November. After Mr. Cooper came, I followed up the grade separation matter, and attended the secret meetings, and reported them the next morning—that is such of the meetings as I was permitted to enter. All the meetings I attended I reported. There were probably two or three meetings that we were not permitted to enter. These meetings were usually held in the Mayor's office, and the doors locked, and the reporters held out in the ante-room. Secret meetings are where the Commissioners retire with some one they have business to transact with and close the door, and when they got through, the Mayor, or engineer or someone would take the reporter to one side and tell him what happened.

I believe the City Commissioners had two or three such meetings with Mr. Cooper, and probably Mr. Cannon might have been there. When Mr. Cooper came around the City Hall he was watched pretty closely. You know a reporter keeps at his heels and trails him around. The conference consisted of Mr. Cooper and the city officials withdrawing into a room and closing the door and the reporters stood outside. They knew the names and identity of every person who went inside. As to the source of my information as to what took place at the secret meetings which I did not attend, it came to me from outside parties like the engineer, the corporation counsel probably, or one of the commissioners. In that way I got such information as I could about what transpired inside. We published this, quoting them. The negotiations spread out over

a long time. Probably two weeks in November and two or three weeks in January and February. The negotiations were held probably every day with the Commissioners—sometimes there would be two or three a week. I presume that at these meetings all the phases of the claims of the Northern Pacific and the claims of the city were threshed out. I presume they had their differences. They were finally adjusted apparently to the satisfaction of the Northern Pacific and the city council. As to the Review being satisfied, it took no stand on the question of grade separation. My instructions were to get the news.

WITNESS EXCUSED.

MR. TURNER: The plaintiffs rest.

Whereupon the following testimony was offered on behalf of the defendant.

The court then admitted in evidence, without objection, DEFENDANT'S EXHIBITS 23, 24 and 25.

The Court then admitted, over plaintiff's objection, DEFENDANT'S EXHIBIT 26.

C. SIMONSON. Called and sworn on behalf of defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

My name is C. Simonson. I am fifty-six years of age. Am at present bridge supervisor on the Pasco Division of the Northern Pacific Railroad. I first went through Spokane in 1880. The railroad was complete at that time. I started work at Granite, Idaho, going westward in connection with the surveys on the then operated line, running section lines in connection with

the then present track. I came back to Spokane to live in 1891. I was then resident engineer of the Northern Pacific Railroad. My jurisdiction went from Hope, Idaho, to Pasco, Washington. I remained in that work to 1900. Since that time I have been bridge supervisor. In 1891 I came here as resident engineer here, with headquarters at Sprague. In my capacity as resident engineer I made up profiles and plats of the railway tracks at that time. I have my notes on the old work I did. I had occasion to locate where the center of the main track was originally. The main track was taken up about a half block west of Stevens Street, but from just a half block westward down towards Hangman Creek it is just the same as it was when located. The change near Stevens Street was made only lately. According to my notes the main track is where it was originally; I am speaking from that. When I took charge of the office the notes of my predecessor were left with me. I have them today. Also the government notes. I have the field notes.

I made the original, of which this a blue print, (referring to defendant's Exhibit 27). This blue print is correct. It shows the track as it existed in August, 1891, from Division to Maple Street, entirely through Railroad Addition. It also shows warehouses and buildings and depot. It represents the situation as it was in August, 1891. The main line track is located as it was in 1881, as shown on the plat of the addition.

The plat was then admitted in evidence, and marked DEFENDANT'S EXHIBIT 27, subject to objection.

Witness then identified Defendant's Exhibit 28, which was thereupon admitted in evidence.

I made this plat in 1895. It is a correct representation of the situation as it was at that time, showing the side tracks, main track and buildings from Washington Street westerly to Maple Street. The Knapp-Burrell building, shown on this map, was there in 1891. It was a brick warehouse 102 feet long and 70 feet wide, with a platform in front of it and a siding to the platform. The building is there today, with a slight modification of the platform. The next building shown on the map was the Washington Feed Company on Stevens Street—the old Northern Pacific elevator. It was leased to the Washington Feed Company in 1891—it was again leased in 1895, a renewal. This building was removed when the Fairbanks-Morse building was put up.

Going west to the freight depot. I can't say when that was put there; it was there when I came, when I went through here in 1890.

Going on further; the Northwest Storage Company was there in 1891. It was leased in 1892.

There is another brick building that was there on Howard Street in 1891, The W. D. Plant Company. The warehouses shown on this map across Mill Street were taken off the map, because they were removed in the latter part of 1891.

Going on west there was the Bye stoneyard, it is marked. It is called a woodyard, but it was a stoneyard. That covered the track from Adams to Monroe. It was 90 feet wide and enclosed by a board fence. That was leased in 1891. It was so occupied about two years. It was still used in 1895. The ground

was split up to the Asphalt Paving Company when they commenced paving here.

Going further west Bye had block 21 leased to the center. Then came the Aschenfelder mill and lumber yard; but that was not there in 1891.

Taking the south side of the map in 1891, the map shows a side track extending all the way from Cedar Street east to Washington Street, right along the edge of the lots on the south of the right of way. That is a warehouse track, to accommodate all the warehouses. August 1, 1891, is the first record of that track I have got. The track was there prior to 1891. The track was there in 1890 when I first came. These sidings were used all of this time to spot cars opposite the different warehouses. When someone ordered a car it would be spotted to his warehouse and unloaded there. Beginning at Monroe and going west to Walnut, there was a team track where wood and hay cars were spotted for customers who had no warehouses on the warehouse track. The map shows a strip forty feet wide between the team track and the warehouse track on the south side. This was practically the condition from Wall (Mill) Street down west to Walnut Street. The map of 1885 shows no change on the south side. ?

The witness then identified by crossing with a pencil, the main track on both maps (Defendant's Exhibits 27 and 28).

Witness was then shown Defendant's Exhibit 29, and identified the main line on it by marking the same with a cross.

CROSS-EXAMINATION.

BY MR. POST:

The only thing that happened between 1891 and 1895 as an encroachment on the 225 foot strip is the McLean two story brick building just west of Post Street, and the stone yard of Bye west of Monroe. The Aschenfelder and Sexton mills are west of Railroad Addition—in Browne's Addition. The warehouses shown on the south side were all on private property and not on the 225 foot strip.

WITNESS EXCUSED.

A. A. NEWBERRY. Called and sworn on behalf of defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

I am sixty years old. I came to Spokane in February, 1880. I did not stay here at that time. I came back in 1883. At that time I was land agent for the Northern Pacific Railroad. Yes, I had to do with the sale of lots in Railroad Addition. It is very difficult to tell in detail as to the settlement south of the track in 1883. I am a little cloudy about where the buildings were. My recollection is that what buildings were south of the track began fronting on Second Avenue, or Second Street as it is called here. There were a few residences, very few, I think—one near Monroe—that fronted the other way. The railroad company had a building on that side that had been used as a hospital during construction; that was practically on block 28, across Monroe Street. It was occupied as an office in 1884 and 5. I can't say positively whether it was on the right of way or on this block. Henry Stimmel

lived in some rooms in that same building. I can't say in detail whether there were any buildings on a line with this one east and west, or very nearly in front or in the rear of that hospital. There were some buildings on those blocks, but where they were, I can't tell. There were very few prior to 1886 and 87. I can't say as to whether they were railroad buildings, section houses, etc.

Going to the north side of the track, prior to 1889, the Sprague House stood at Post, between Post and Lincoln, probably in block 16. There were two or three little buildings between the Sprague House and Lincoln Street. My recollection is that Dr. Gandy owned them. There was a small restaurant, and I think a saloon there. Thirty years ago is a good while to remember back in detail. In the years 1883, 84 and 85, Howard, Riverside, Main and Front were the principal business streets. In 1883 Howard and Front was the principal corner of the city. As to travel along the railroad right of way during the year 1883 and along there to 1889, anybody went pretty near anywhere they wanted to; they traveled along the right of way and whenever the cars happened to stop to discharge freight or anything of that kind they would drive up to them. It was not a graded street or anything of that kind, but we never followed any street when we came from downtown going home. We always went across lots. I think that the Sprague House had a sidewalk in front of it, and that the building upon block 18 had a sidewalk in front also. That was prior to the fire, in 1884-85. As to travel on Railroad Street between 1883 and 1889, I don't recall that

it was any more of a street than a great many of the blocks were. It was open here a great deal of it, and when they had to go to the cars or freight house or anything of that kind, wagons traveled along there. The land department always was talking about this property, always talked as though it would become warehouse property; we never considered it anything else in those days, from our point of view. I don't know that we gave the question of use as a street much consideration.

Last answer left to stand, subject to objection.

CROSS-EXAMINATION.

BY MR. POST.

I remember the map of Spokane Falls, Plaintiffs' Exhibit 10. It was presented to me, has my name on it. It was presented to me by a Mr. Marsh, then living in Spokane. He was in the real estate business, with a desk in my office. This is the first map of Spokane. It was in general use by real estate men; all used them in the city. It was the only map. I can't tell when the next map was made. Besides this map, I had in my office a map of Railroad Addition. Had to have the plats. When I sold lots to people in Railroad Addition, I had hanging on the wall a plat of the addition, and the city map referred to. The addition was practically sold out when I took the office. Mr. Abernethy was the first agent. He sold the most of it, and then Mr. H. L. Cutler took charge, and he had about closed it up. I sold very little of it.

Referring to Exhibit 11, I think none of the sales there mentioned, with the possible exception of Parker

and Van Houten, went through my office. Mr. Van Houten was associated with me, and possibly he dealt directly with Schulze. There were no graded streets in Spokane in 1884. By 1886, Riverside Avenue had been graded some, I think. I think Riverside was the first graded street, and possibly Howard. I can't recall any hotel on the north side of Railroad Street but the Sprague House. Might have been more. I think there was one west of that, but I am not positive. I can't answer as to the number of saloons. I can't recall what merchandise stores there were on the street. I wouldn't say there were not any. There were some agricultural implement people, something of that kind, before the fire, I recall.

On the south side of the track there were some residences, and one store adjoining where I lived. I can't say as to residences on the north side. You see there was so much of these things wide open and the streets were not graded, and it would be pretty hard to say just where a house was. The only place where there was a graded street at all was Riverside Avenue.

It was a good while ago. I am pretty hazy as to the buildings that were on either side of the track. I was a very busy man in those days, running back and forth across the continent, chasing the railroad, and I was paying more attention to other things. They didn't impress themselves on me, that is all.

WITNESS EXCUSED.

FRANCIS H. COOK. Called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

My name is Francis H. Cook; fifty-two years of age; came to Spokane in 1878. I have lived here since 1879. I was familiar with Railroad Street, I don't know that I ever heard it called by that name. We sometimes called it Railroad Avenue. I think it was to designate the vacant spot between First Avenue and Second Avenue; that is my idea.

I suggested to General Merriam that he buy a piece of property in Railroad Addition, and took him to the agent of the property. I had a conversation with the General as to the boundaries of the property he bought. He bought the small block between Mill and Post Streets. I told him it would have a street on three sides and the railroad right of way on the other. (Answer admitted subject to objection). I don't recall the year, but the railroad plat had just recently been laid out, and but few lots were sold, very few. At that time the railroad right of way was in the same condition that almost all of the property south of what we call Sprague Street was in. There was hardly anything in the way of improvements. This was right soon after the plat was laid out. From that time to the fire we traveled most anywhere. There wasn't any obstruction anywhere over the country. If there was a building or a line of buildings we went around them. There was nothing on this side to indicate streets much, except Howard up to the time of the fire, and after, I lived always on the hill south of the tracks. In a business way the center of the town in 1883 and 4 was at Howard and Main. Dur-

ing these years, in proceeding to the depot we went up Howard and then down on the south side of the depot. If we went afoot or horseback we cut across. The depot was west of Howard. We went where there was no resistance, and went that way up to the time of the fire. There were a few buildings on the south side before the fire, but not very much. At that time I had no business with the rest of the town. I was really a farmer. I remember the Sprague House. I don't recollect much about the street, but I remember the Sprague House. I think it burned before the big fire; it seems to me it burned alone.

CROSS-EXAMINATION.

BY MR. POST:

During most of the time before the fire, I lived on my claim, about a mile and a half south of the track. During that period I did not buy or sell any lots in Railroad Addition; except one on Second Avenue and Post.

I remember the Taylor and Sharkie building. My recollection is that it faced Howard; it may have faced the railroad also. There may have been buildings on the north side of the track between Stevens and Howard, but I don't call to mind any. There may have been some between Howard and Mill, and between Mill and Post, and Post and Lincoln. I think there were buildings between Lincoln and Monroe. I guess those that were built, if they did not face the side streets, had to face the track if they were going to do any business.

My recollection is not distinct about every building and the size of the building and where it stood and

how many in a block. I know people could drive parallel with the track, and did drive there for several blocks, within a space of 100 feet of the railroad track—something like that.

With the exception of one warehouse on the south side of the track, prior to the fire, there was nothing to hinder people from driving along the south side of the track from Washington Street west for several blocks, and they did drive there. I did not travel that way myself very often after I was told not to. A man named Pond, who was roadmaster, stopped me once sometime in 1883 or 84. I was down at the warehouse I have just referred to, on the south side near Post and Mill. I was going down there to haul some machinery. I went in there because it was handy. The machinery was pretty heavy to lift, and I didn't want to take it through the warehouse. Mr. Pond saw me before I got away with it. He made me drive around the warehouse and take it through—take it out of the back end of the warehouse, instead of the front. The passenger depot was pretty well west near Post or Lincoln. The freight depot was further east on the south side.

WITNESS EXCUSED.

SAMUEL GLASGOW. Called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

My name is Samuel Glasgow; fifty-four years old. Came here in 1882. Am engaged in the milling business, and have been so engaged since 1885. Since that time I have been familiar with what is known as Rail-

road Street here, right of way of the Northern Pacific Railroad. Referring to plaintiffs' Exhibit 9, the freight depot must have been constructed before I came here. The picture shows the foundation of it, evidently. Referring to plaintiffs' Exhibit 1, the map of Railroad Addition, the station shown upon it near Lincoln street was here when I came. As to the condition of the right of way from the time I came here in 85: there were no streets; you could drive anywhere except where the rails were laid. There were really no streets; didn't know where the streets were. This was true for several years up to 85 or 6 when Post Street was opened through. Howard Street was opened through also before that. Between 1882 and 5 the railroad right of way had some warehouses on it on both sides. As to driving we used to unload our wheat, the cars would be standing on the side track and we would drive in and unload on what we called the team track. These team tracks were situated between 1883 and 1885, between Howard and Monroe. I don't remember how many tracks. The right of way was not used by the public in general unless they had business on the railroad track; that was what we used it for. If I were proceeding from the depot there in 1883 or 4 down to Main and Howard, on foot, or horseback, I would cut across these different blocks where Davenport's hotel is being built, and upon the street, angling through it between blocks. With a team I would take the same course. This course of travel ceased as from year to year there would be new buildings stuck up somewhere that would finally throw them around into the street. I remember a saloon immediately cross

from the old Northern Pacific depot about a hundred feet or more from it. I don't remember a hitching post. I remember a couple of little buildings beside it; hot cake joints, one of them set the town on fire. There were two of these all together in that block. I remember the Sprague Hotel. I used to go there occasionally. I think it was just west of Post. I can't remember when it burned down, but it hadn't been built long. South of the right of way in those days, it seems to me at first the Northern Pacific had some freight sheds and later they were on the north side just east of the passenger depot. I remember the Northern Pacific hospital there on the south side. Taylor had a place on Howard, it faced Howard. It was where Holley-Mason's building now stands, if I remember correctly.

CROSS-EXAMINATION.

BY MR. POST:

Before the fire there were some buildings on the track on Railroad Street between Howard and Mill, fronting on Howard. There were some buildings on the north side between Post and Mill Streets, facing the track. I don't remember what they were. I have no idea of the character of business that was done in them. There were buildings between Post and Lincoln Streets on the north side. I don't know that they faced the track; they might. It seems to me there were some buildings between Lincoln and Monroe, but they didn't face the track as I remember it. I don't know what the buildings were or what they were used for. I can't tell you of any building on the north side of the track there in that first tier of blocks before the fire. The

only buildings I can tell you about on the south side is that hospital and the house I lived in. Perhaps if you could name them I might remember some lodging houses on one side or the other before the fire. There were two buildings in there, I can't remember what they were. I don't remember any lodging houses nor saloons, nor retail stores of any kind. There were no wholesale houses there in those days. I guess there were some excises of cinder sidewalks on both sides of Railroad Street on Post; I guess that was the custom of the section men. I have no distinct recollection of any cinder sidewalk. On the north side of the track between Howard and Stevens Streets there was an elevator there I spoke of. There was a driveway they used to go there to unload wheat from the elevator. There was an alley through there. They used to drive in one way and out the other, from Howard to Stevens. Anybody could drive along there from Howard to Lincoln. From Lincoln I don't know as there was much occasion to come through; nothing to reach there. They could drive through if they wished from Post Street to Lincoln. I don't think they drove from Lincoln to Monroe, although I don't know. There was a hide and fur depot in there; Behrend built that very early; I think in '82 or 3. I think the Taylor and Sharkie place fronted on Howard Street, but can't swear to that. Looking at this picture I think it faces north. The picture referred to was then offered in evidence as Defendant's Exhibit 30.

The fur depot referred to, was on the north side

of the track near Monroe Street. It might have been one or two hundred feet from the track, I can't say.

WITNESS EXCUSED.

T. W. TOLMAN. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

Witness identifying Defendant's Exhibit 31: I made this picture this morning. My camera stood on the platform across the street in front of the warehouse, that is the platform that is next to the car line looking north,—the platform in front of lot 3 block 28. My camera was right on the platform and only a few feet from the north end of the platform, and about four feet from the east end of the platform in front of this building, the warehouse that fronts on Railroad Avenue and Howard Street. My camera was directly towards the northeast.

The witness then indicated by a cross the southeast corner of the Turner building.

Witness then identified Defendant's Exhibit 32, showing that section of the Northern Pacific tracks from the passenger depot west.

Witness then identified Defendant's Exhibit 33, as having been taken by him upon the previous day, Witness: This picture was taken from the top of a box car on the east side of Stevens Street on Railroad Avenue. The south side of Railroad Avenue. It takes in the Cracker Company, Fairbanks-Morse, and a corner of the hotel.

Defendant's Exhibit 35 was taken from the same side of Stevens Street, looking southwest towards

the United Iron Works building across the right of way. In the distance is the Holley-Mason-Marks building.

Defendant's Exhibit 36 was taken from the east side of Howard Street looking southwesterly directly down the line of warehouses that are now on the north side of the railroad.

Defendant's Exhibit 37 was taken from the street which runs north and south, Post Street, towards the Spokane Dry Goods Company, looking down the right of way.

Defendant's Exhibit 38, that was taken on a point northwest of Post Street looking in a southwesterly direction towards F. S. Harmon & Company, wholesale.

Defendant's Exhibit 39 was taken from a point further down in the right of way, at Cedar Street, I believe, looking toward the Inland Brewing Company's plant along the right of way.

Mr. Post objected to the introduction of Exhibit 39 as showing the right of way beyond Railroad Addition. Exhibit admitted subject to objection.

WITNESS: Defendant's Exhibit 40 was taken on the east side of Wall Street (Mill Street', nearly in the center of the right of way, looking northwest towards the Polson Implement Company.

Defendant's Exhibit 41 was taken from the east side of Jefferson Street looking west.

I took these photographs myself and finished them myself and know them to be absolutely true.

WITNESS EXCUSED.

C. G. CARPENTER. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON

I came here in '87. I am a painter and did some work before the fire on a hotel opposite the Northern Pacific depot, close to the land that was owned by Dr. Gandy. At that time facing the depot there was a restaurant and saloon and I think they had some rooms upstairs, and some lodging houses in there, four or five buildings. That was in the block facing the depot. I don't think there were any sidewalks. At that time there were not as many tracks on the right of way as there are at present. They could drive most anywhere. I don't remember whether they did or not. I guess they could the same as you could go anywhere in town, pretty near.

WITNESS EXCUSED.

J. D. KOREN. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON

J. D. Koren; am Division Engineer of the Northern Pacific, in charge of the Spokane District. Have been here for six years; have charge of the maps, plats and profile of Spokane. The plat, Defendant's Exhibit 42, was made in my office, and under my direction; it is a blue print of what we call the station plat, the plat that we operate trains by. This plat is correct up to a couple of months ago. Since then we have done a little changing up there at Stevens Street. Otherwise it is correct. Referring to the buildings on the north

side of the street between Washington and Adams Streets, these buildings are correctly delineated on the map. The second track from the north is the main track, and is the original line of the company. I have checked that out and know it to be a fact. Referring to Defendant's Exhibit 32 McClintock-Trunkey Company's building shown on that picture is indicated on the map. This is a brick building about 200 feet long and 70 feet wide, that is 200 feet east and west and 70 north and south. The Fairbanks-Morse building shown in Defendant's Exhibit 34 is a three story brick building, seventy-five feet east and west and seventy-two north and south. The Durkin building is approximately ninety-two feet east and west and seventy-two and one-half deep. The next building is Hughes & Company plumbing establishment. This building is four stories high, of brick, is a hundred and thirty-seven and three tenths feet east and west and seventy-four and three tenths north and south. This building, like the rest, has a platform in front. The next building is McGowan Brothers. That is 90 feet east and west and 80 feet on Howard Street. This building is shown on Defendant's Exhibit 37, on the west side of the picture and is four stories high, built of brick. The next occupant is Armor & Company; their building is of brick, two stories high, 83 feet wide along the track and 71.9 feet on Wall (Mill) Street. Has covered platform 27 feet wide, all within the 225 foot strip. The next building to the west is the Powell-Sanders Company, shown in Defendant's Exhibit 40. It fronts on Wall (Mill) Street. This building is 109 feet in length on the rail-

road and 75 feet deep, practically, three stories high. The next building is marked D. J. O'Callahan & Company. This is in the same block—all these buildings are north of the track. This building is 54 feet on the railroad and 74 feet deep. There is an alley behind all four of these buildings. The Ryan and Newton building comes next. It is on Post and is 117.8 feet deep along the track and 64 feet wide on Post. West of that the Crane building is built of brick and is 105 feet along the railroad and 75 feet deep. Next the Polson Implement Company. This building is 151 feet long, 73 feet deep, is built of brick and approximately six stories high. Below that on the west side of Lincoln Street is the Rasher-Kingman building, 100 feet along the track and 75 feet deep. Then the Moline-Bain Company. Their building is three stories, of brick, 200 feet along the track, 81 feet deep in the middle of the block and 65 feet with a platform on Monroe Street. Across Monroe Street is the Washington Machinery Company. That is a brick building, 124 feet wide on Railroad Street and 74 feet deep with a platform. Next is the Washington Rubber Company with a building 50 feet wide on the railroad and 80 feet deep. The next building is a three story brick 126 feet on the railroad and 79.7 feet deep in the middle of the block and 73.71 on the street with a platform. Then there is a vacant space, and west of that some small holdings. Then going to the south side and coming east there is the Inland Brewing Company and then the Harmon Company's building. This building is of brick. All the buildings on the south side are warehouses all the way

up. The Spokane Dry Goods Company's building, at Lincoln and Railroad, is six stories high and covers 150 feet along the railroad and 141 feet deep. From there on to Washington Street on the south side is pretty well covered with warehouse buildings. There are no private residences or anything of that sort. I know of nothing used for anything except wholesale purposes.

Defendant's Exhibit 42 was then admitted in evidence.

CROSS-EXAMINATION.

BY MR. POST:

I did not make this map; it was made by a draftsman in the office. The tracing was made about a year ago; it has been corrected since. The map has been done by draftsmen in our office; that is all I know about it. I don't think I am mistaken in saying that all the buildings on the south side are warehouses and nothing else; I have never gone through them. Personally I know nothing about them, I have not gone through them. I have walked in front of them. The Holley-Mason building is used for a retail and wholesale hardware store; that is one of the buildings put on there. The buildings on the south side are not on the 225 foot strip, except the main track I can't exactly say when the tracks shown on the map were put there. Very few of them were put there within the six years that I have been division engineer. I know of but one, that little one in front of H. J. Shinn & Company. From memory and without referring to this or other maps, I could not tell you what tracks there are at any place along the track.

WITNESS EXCUSED.

B. W. WALKER. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

B. W. Walker. I am train master for the Northern Pacific. Have held that position for four years. Before that I was chief clerk and stenographer to the superintendent. I have been in Spokane since 1894 with the exception of about a year and a half. At this time I have charge of the trains running in and out of Spokane.

Q. Now give us the number of trains or train movements per day, either switch or main line trains passing over Division and Sprague.

MR. POST: I think I will object to that as wholly immaterial.

MR. CANNON: I want to show the necessity, and danger to human life.

THE COURT: That is the east end?

MR. CANNON: Yes, but it is impossible to raise one block without raising the others.

The court admitted the testimony subject to objection.

WITNESS: We have regular movements every day amounting to 132 at Division and Sprague. In addition to which we have the switch movements which fluctuate from day to day depending on the amount of business to handle, which will run anywhere from 150 to 250 additional; all together between 260 and 300 a day at the present time. Conditions at the present time are normal, but will increase during the summer and fall. There is not quite as much at

Browne Street as at Division and Sprague, but very nearly; Browne is the first street west of Division and Sprague. At Howard Street at the present time we have regular movements that has run about 126; in addition to which we have extra movements, switch movements, that will run it up to about 20 to 50 more. By switch movements or extra movements, I mean the switch engine handling city cars or moving cars from one point of the yards to the other, or engines moving from one part of the yard to the other. Going down to Lincoln, Mill and Post, the regular movements at that point will amount to about 44 per day; switch movements will run anywhere from 20 to 50 additional. Stevens is just about the same as Howard. The worst is Division Street, next comes Browne and then Stevens and Howard are in order; from there on we have fewer switch movements and our trains in making up do not extend to these points. Of these trains there are two passengers each way a day that are S. P. & S.; the balance is Northern Pacific, that is to say, all of these trains are Northern Pacific except about six a day which are Spokane, Portland & Seattle. The two congested periods at Sprague and Division, are from six to nine thirty in the morning, and from five to between ten and eleven thirty at night. At Division Street we aim to open up the crossings from three to five minutes, and leave it open long enough to let the congested traffic pass. Sometimes it is by in thirty seconds, sometimes it takes a couple of minutes. Then several street car lines of the Washington Water Power Company cross the tracks at this point. Then going

west to Washington Street, as shown in Defendant's Exhibit 28, Traction cars go under the railroad here in a subway. There are no tracks on Stevens Street. The Washington Water Power Company's tracks cross Howard Street, that is the Cannon Hill line, Liberty Park line and Second Avenue line. Mill, Post, Lincoln, Monroe, Madison and Jefferson Streets have no street cars. At Maple the Washington Water Power Company's cars cross, and the Traction Company's lines at Cedar. Stevens, Howard, Mill, Post, Lincoln, Monroe, Madison, Jefferson, Adams, Cedar, Walnut, Maple, Second and so on down to Fifth Avenue all cross the railroad tracks at grade. East of Washington Street, Browne Street crosses at grade. Then Division and Sprague cross on an intersection. Referring to Defendant's Exhibit 42, the blue print of the company's yards, the open spaces shown from Washington Street on down to Cedar Street, between the tracks, have been used occasionally for teaming work. The space between Stevens and Washington has been occasionally for that purpose, but not very much. The space between Howard and Wall is used for teaming purposes and a short spur in there was for unloading heavy machinery where we had a crane erected. The same from Wall as for down as Lincoln Street; this is used occasionally for team track work, but that is on the industrial track on the north side, and the yard track on the south side. Not so much in this particular territory as it is further west. The piece between Lincoln and Madison is not used much for teaming. It is a place that was left vacant in making leases between the industry

tracks and the yard tracks. From Madison Street west to Cedar Street the space between the tracks there is used very largely for team track work; what we call our team track yard. The space between Madison and Lincoln is left vacant because of the leads built across from the team track to the industrial track, and teams can't pass along it or use it, that is, they can use it for unloading, but they can't always pass along because of cars standing on the tracks. I am familiar with the use to which the public has put the right of way since 1894. The only use that we ever knew that was made of it was in connection with the loading and unloading of cars when they had business with us, not for their own use outside of the company's business.

CROSS-EXAMINATION.

BY MR. POST:

My office hours are from eight in the morning to six at night. I am generally pretty well confined to my office during those hours. Without being out in the yards I would not know a great deal of the public use that was being made of the right of way by people travelling up and down, from 1894 to 1900.

WITNESS EXCUSED.

J D.KOREN: Recalled.

I have prepared, according to measure, a typical section of two or three blocks, showing the situation of the retaining walls as they will be built relative to the center lines and the line 100 feet on either side of the center of the track. I prepared this myself. The structure is located where the ordinance requires

it to be, and it is typical of the entire structure through the city.

The document was then admitted in evidence, marked DEFENDANT'S EXHIBIT 43.

WITNESS EXCUSED.

MORTON McCARTNEY. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

Morton McCartney; thirty-five years of age, civil engineer by occupation, and city engineer of the city of Spokane, and have been such three years. Referring to Defendant's Exhibit 42, at Sprague and Division Streets, where the railroad crosses the present elevation is 1928.4 feet.

Referring to Defendant's Exhibit 44, ordinance No. C-2221, re-establishing the grade of Sprague and Division, the elevation of the intersection is 1921.7 That means a depression of 6.7 feet in the street below its present elevation. At Browne Street there is no grade elevation. There is no ordinance providing for grade elevation between Sprague Avenue and the south side of the Northern Pacific right of way. At present the grade is approximately 1926. At Stevens Street the present elevation is 1919.3. The proposed elevation at that street is 1918, a depression of the street 1.3 feet. There was an ordinance passed changing the grade of each street, except Browne; that is pending. The Stevens Street ordinance was passed February 17, 1913. Going west to Second Avenue, the present elevation is 1915.1. The proposed elevation in the ordinance is 1911.1, or a depression of 4 feet. Maple

Street is the same. The date of that ordinance is February 17, 1913. At Howard Street, the present elevation is 1918.2. The proposed elevation of the street is 1914.7, or a depression of 3.5 feet. That depression is on the northrail of the present railroad. At Wall Street the present elevation is 1917.5. The proposed elevation is 1916.8, or a depression of .7 of a foot. At Post Street, the present elevation is 1916.2, and there is no change in the plans. At Lincoln Street, the present elevation is 1914.2 with no change. At Monroe Street the present elevation is 1912.4; the franchise provides an optional change there. This ordinance has not been passed as the city has not decided what it is going to do, so there may be no change in the grade there. The same is true at Madison, the present elevation of which is 1911.1; also at Jefferson where the present elevation is 1910.8; and at Adams present elevation 1810.8. Cedar Street is unchanged, the present elevation being 1911-.75.

THE COURT: The only substantial change made is at Howard and at Stevens.

WITNESS: At Howard Street the grade does not go beyond a point 152 feet south of the south line of First Avenue—I don't know whether it is the north or the south line of the alley between the Hughes building and the Theatre building. There is a rapid rise from the alley to the railroad track. The rise breaks at the north rail. The majority of these ordinances changing the grade were passed February 17, 1913. One or two were passed since that date—passed since the commencement of this suit.

As city engineer, I have occasion in a general way to observe the congestion of traffic at different points on the track. I have made nothing that we would call a scientific investigation of the matter. We made no record of the number of trains or teams or anything of that kind, except such as we might have made casually in passing over the intersection, as I do at Sprague and Division a number of times. I found the crossings blocked there for a good many minutes with a great many passengers, pedestrains and vehicles congested, both on Division Street and Sprague Avenue. I remember once in the summer, May or June, when passing by there in an auto, I think we counted about fifty pedestrains lined up on Sprague Avenue and Division Street west and north of the intersection, with about twenty-one or twenty-two vehicles, but as I say, we have never made any permanent record of anything of that kind. At Browne Street I never have noticed any great congestion. At Howard Street I have noticed a great deal of congestion at times. Sprague and Howard, Fourth and Fifth are about the only crossings used a great deal. The two principal points being at Sprague and Division and at Howard Street.

CROSS-EXAMINATION.

BY MR. POST:

These ordinances were prepared in my office. Copies were sent to the Northern Pacific at their request, but there was no collaborating in their preparation—there might have been, I suppose, afterwards. I mean by the city commissioners, after I sent them to the council. I sent copies to the Northern Pacific depot at their

request so they could see exactly what they were. These ordinances were prepared in order to carry out the terms of the grade separation ordinances in question here.

WITNESS EXCUSED.

M. F. CLEMENS. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

My name is M. F. Clemens; I am a civil engineer; I had charge of the track elevation work for the Northern Pacific through the city here at the time it was stopped after this suit was brought; I have been engaged in railroad engineering for fourteen years. After the tracks of the Rock Island Railroad were elevated in Chicago, I had something to do with the study of bridges; the killing of sound on bridges, and also travel over this elevated track, for probably three years. These tracks were about ten miles in extent. Part of the way there were six tracks and part of the distance four tracks. The structure was approximately fifteen feet high. It was built of masonry, filled in between, mostly with sand. The structures across the streets consisted of high masonry abutments, steel bridges, open floor bridges. In the early construction there was nothing at all to deaden the sound. This was not changed while I was there, but they made several investigations with the idea of changing. Eliminating the cross streets, as far as the noise from the actual running of the trains on the rails is concerned, the noise is the same; I would say that the noise was about the same on the elevated

structure as it would be on the ground. There was no difference that I could detect as far as noise is concerned. I lived possibly two blocks from the tracks, and could hear a train crossing a bridge; after it got onto the fill it could not be heard at all that far away. This elevation obviates the necessity of using whistles on crossings. On the Spokane grade separation under the ordinance we are permitted to build either steel or concrete bridges, putting any structure or either structure. The floor of these bridges would be ballasted, will be filled in with concrete the thickness of probably between one and two feet solid, and then ballast placed on top of that so that it will act as a deadening. In some bridges in Chicago they had ballast floors which took up a great deal of this noise. With respect to the noise over a structure like this, take Howard Street for instance; there is now eight street car crossings. There is noise made by them, by the train and street cars going over these crossings, fully one-half of the noise at that point is due to the street car crossing. That will be entirely eliminated in the structure above. There is an opening in the rails of every crossing for the flanges of the wheels. Then the planking, after it is there for a while, becomes loose, and it makes a noise along the track, and also rattles from passing vehicles. Speaking in a comparative way, I would say that fully fifty percent of this noise would be eliminated by the elevated structure. As to soot and gas and all that sort of thing I don't see that it would make any difference one way or the other. There will be just as much smoke and dirt and gas one way as the other. I might only give

an opinion as to whether they are carried to a greater distance on an elevated structure. I think the most of the smoke from an engine going along, goes straight up anyway.

This (referring to drawing) is a section of the roadbed on each block between the streets, showing the tracks and the wall and giving the distance from the south line of the property. This shows the retaining walls six track system. This line is the south property line (indicating).

The document was then admitted in evidence, and marked DEFENDANT'S EXHIBIT 45.

This is a typical section across the street. That would be standing on a line with the street and looking in either direction. This is a proposed scheme of the steel bridge. This shaded portion shows concrete filling in between the girders with a ballasted floor. There are the ties and rails upon it and underneath the ballast and then concrete underneath that. The shaded portion is the concrete in the troughs of the steel floor. The defendant's exhibit 46 was then admitted in evidence.

This other blue print, (referring to defendant's exhibit 47, admitted in evidence,) shows a reinforced concrete bridge. The upper drawing represents the view as it would appear standing in the center of the street and looking towards the end, shows the rail at the top along towards the side of the tracks. The only ornamentation is a rail. This plan shows three posts in the street. This is a proposed plan of steel or concrete bridge. The second section is a section through on the center line of the track, showing the

way the slabs are made for the support of the track; the section at the lower right hand corner, that is looking towards one of the abutments, cutting the bridge on the center line of the track. It shows a ballasted floor on top of the concrete, and it shows the ties that will be arranged on that ballast. The view shown at the left hand lower corner is a view of the center line of posts, or either line of posts I would say. Looking toward the center line of the posts, that shows the section across the concrete curd, the elevation of the posts and the ballast and the ties resting on the ballast.

These plans have been the result of a number of years of track elevation progress, as we call it, and I know of no better or more complete construction than these two. We have agreed that our bridges shall be one or the other of these plans, depending upon the height of the structure, and all that. I have not received definite instructions, but in all probability the concrete structure will be used at such streets as it can be used. A concrete crossing requires more clearance. What we call a square crossing can be made of concrete, but the skew crossing would necessarily have to be of steel. Sprague and Division and Maple and Second would have to be of steel.

WITNESS EXCUSED.

Charles R. Lonergan, the General Agent for the Northern Pacific Railway, at Spokane, was called and sworn, and identified the copy of the lease to the Polson Implement Company, as being typical of all of the leases issued by the Railway Company to private occupants for portions of the land embraced

within the 225 foot strip on the north side of the track. This document was admitted in evidence and marked DEFENDANT'S EXHIBIT 48.

MR. TURNER: I think the rules of the Supreme Court say something about taking an exception in order to have the matter that is objected to considered by them. I suppose it will be understood that we take the necessary exceptions on both sides in every case.

THE COURT: I have been acting on that assumption throughout the trial, that the record is made up properly.

MR. GRAVES: Yes, we will not bother about the formal exceptions now.

WITNESS EXCUSED.

ARON BURR JACKSON. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR CANNON:

My full name is Aron Burr Jackson. I am the General Agent for the Spokane Portland & Seattle and the Chicago, Burlington & Quincy Railroads in Spokane. I have lived in Spokane since 1889. I came here as a representative of the Northern Pacific Company after the fire. I remained with the company, I think, about three years. When I first came here we had no office except the street. My first permanent office was in the Ziegler Building. After I came here in 1889 the railroad company used what is called Railroad Street here in the handling of their business, and the handling of trains and the loading and unloading of freight. The first warehouse that was built

on the Northern Pacific were built on the south side of the track. There was a string of blocks west of Lincoln Street that was in the hands of the Land Department at the time I came here abutting on the Northern Pacific right of way. At my request they were taken out of the Land Department and put into the Operating Department and were then leased as warehouses. That was on the south side. We filled these up as fast we could.

MR. POST: Those on the south side, as I understand it, are all in lots and blocks; they are not in the 225 foot strip?

MR. GRAVES: That is correct, but we propose to show that when that was all occupied we had to have others ready.

WITNESS: That was built up in 1890 and 1891. The first building leased on the north side was to W. D. Plant & Company on the corner of Howard Street on the north side of the track and was a one story brick warehouse. That was on the right of way, if I remember correctly. The lease, as I remember it, called for a strip in the rear of it to be left there as an alley for the use of the owners of the warehouse and the inside lots. This first lease, to the best of my knowledge, was in 1891. For the next three or four years the lots were leased just as fast as they were required and the proper people made application; that is, people desirable for the railroad company in the way of tenants. From that time on to now it has continued. They built it up as fast as there was tenants for it and I understand it is all practically leased. An alley was maintained as a rule between the

southerly line of blocks 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 on the north side. It was provided for in the leases that I handled myself personally. During my work with the Northern Pacific I never heard of any claim of the city that they owned the property.

CROSS-EXAMINATION.

BY MR. POST:

Buildings that I referred to as having been built within two years after the fire on the south side on the Northern Pacific tracks, were outside the 225 foot strip. They were built on the lots that I explained and taken out of the Land Department and put in charge of the Operating Department. They were not part of the right of way but were platted lots that the railroad had not previously sold.

WITNESS EXCUSED.

EDWARD C. MILLER. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

Edward C. Miller; first came to Spokane in 1881. Just passed through here then; came back here in 1884; been here ever since. I became foreman of the Northern Pacific freight depot in 1884. I have been with the railroad ever since, and am check clerk in the freight depot now. When I went in charge of the freight depot in 1884 we had three tracks. The passenger depot was on the north side of the track between Post and Lincoln; the freight depot was on the south side of the track between Post and Mill. The freight depot was built when I came here. Referring to Plaintiffs' Exhibit 9, easterly from the

passenger depot, right near that passenger train, they had begun the erection of a freight depot, that is the freight house that I was in for nine years. For four years after I begun there I was there from day to day, and had to do with loading and unloading freight from cars and from the depot, and the loading and unloading of freight from teams to the track.

Railroad Street in those days was used on both sides as a thoroughfare, people driving back and forth, going either west or east to the freight depot or passenger depot. The cars were left on the track to load and unload. As to the condition relative to driving down town, they could come up Post Street and cut across there near the Pacific Hotel, cut right across there at that time as it was all vacant, if I remember. You could go down Post and Howard Street to the town. They could travel most anywhere in there, as I stated, to the depot back and forth down to the lumber yards. Other people besides those going to the depot could use it if they wanted to, could go anywhere they wanted to. Prior to the fire north of the track there was a small barber shop, restaurant and lodging house. South of the track was a string of residences, grocery stores, from Howard Street clear down to Monroe. They were way south of the track. The Northern Pacific had a hospital between Howard and Mill Streets, that was on the right of way. The grocery stores that I speak of were south of the freight house. On the north side of the track, across from the depot there was a saloon on the corner, next to that was a restaurant, then a barber shop, then a restaurant. They got burned down

at the fire, that was where the fire started. After the fire, to the south of the right of way, they commenced to put up a brick block. I don't know just how soon, I didn't come down very much then, I stayed up in the freight house, in the new location. Since then I have not had much to do down there at the tracks.

CROSS-EXAMINATION.

BY MR. POST:

The map of Railroad Addition, Plaintiffs' Exhibit 1, shows the tracks the way they were when I came here in 1884. More tracks were added before the fire, between the main line and the freight depot, between Mill and Post, little side tracks.

WITNESS EXCUSED.

Defendant then offered in evidence a photograph and the same was admitted, marked DEFENDANT'S EXHIBIT 49.

FRANK JOHNSON. Recalled by Defendant.

DIRECT EXAMINATION.

BY MR. GRAVES:

Before the railroad was built in here there was scarcely any settlement up around Railroad Street or what was Railroad Addition afterwards. There might have been a few shacks along there. Practically the country up there was just as nature built it, that is until the railroad came in. After the fire in 1889 there was a great boom in real estate in the city. That lasted through 1890 and probably through 1891, then a reaction came after that, and then the panic of 1893 came along and the town went pretty flat for a while. Then after that along about '95 or 6

the town began to recover and grow again and business to pick up. That is about a correct picture of what happened during that period.

WITNESS EXCUSED.

W. C. SMITH. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

W. C. Smith; I live in Portland. I was with the Northern Pacific Railroad from 1899 to the first of April this year, in the Tax Department. Prior to coming to Tacoma I was in the Tax Department in St. Paul, and had charge of the Tacoma and west end of the tax business, checking up tax receipts and things of that kind. I was chief clerk in the tax department out here after coming west. The railroad was assessed for the property known as Railroad Avenue since 1899 and the taxes were paid. Also special street assessments were paid. I checked over each and every draft that was sent out for taxes. Since 1902 I have checked the payments prior to being made, and for three years after that I checked them after they were made, checked the tax receipts and special assessment receipts.

Taking the city assessments first. The first paving of Stevens Street from the south line of Front Avenue to the line 100 feet south of the north line of the Northern Pacific Railroad, the assessment is described: "Beginning at the southwest corner of block 12 Railroad Addition, thence south along the east line of Stevens Street 100 feet to a point; thence east at right angles to the said east line of Stevens

Street 150 feet to a point; thence north parallel with the said east line of Stevens Street to the south line of said block 12; thence west along the south line of said block 12 to the place of beginning." Also "beginning at the southeast corner of block 13 of Railroad Addition; thence south along the west line of Stevens Street to a point; thence west at right angles to the west line of Stevens Street 150.58 feet to a point; thence north parallel with the west line of said Stevens Street to the south line of said block 13; thence east along the south line of said block 13 to the place of beginning." That assessment was levied in 1900. The description refers to one of the warehouse properties on what was called a street; it ran into Railroad Avenue 100 feet. The improvement extended to a point 100 feet south of the north line of the Northern Pacific right of way. The northern Pacific assessment began on the edge of the right of way and ran from there 100 feet south into the right of way and back to the center of the block on each side. Taking Howard Street, this street was improved in the same manner. The assessment extended back identically the same way, 100 feet south on the north side of the right of way. This assessment was made in 1900. The assessment district extended on the east and west to the center of the block. In 1905, Washington Street was paved from First Avenue to Second Avenue. For this improvement the entire right of way was assessed. The improvement was in a subway underneath the track and the company protested, claiming that no benefits were received. The assessment was paid.

Mill Street was paved in 1901, and the railroad company was assessed 100 feet south of the north line of the right of way and extended to the middle of blocks 14 and 15. That is, to the middle of the 100 foot strip south of blocks 14 and 15. Post Street was paved in 1900. We paid on this our property being described as being on each side of Post Street, back from the street a distance of 150 feet, and 100 feet wide along the street being adjacent and south of blocks 15 and 16,—the same as the other street.

Lincoln Street was also paved, the assessment extending the same way; also Monroe Street. Madison Street was improved by grading entirely across the right of way, in 1901; the right of way for the full width was assessed and the assessment was paid. The assessment extended to the center of the block on each side. Cedar Street was graded from Sprague to Second and the right of way for the full width was assessed for the improvement to the center of the blocks on either side.

In the same manner I had made and checked figures of the assessment for taxes, state, county and municipal, since 1902. We have paid the regular taxes on this property during all of that time, the time I have been with the company. I mean the entire right of way.

CROSS-EXAMINATION.

BY MR. POST:

I get my information in respect to general taxes from the various documents and files in the company's office. Prior to 1908, the returns were made by the company direct to the county assessor, showing the length of the track, and the assessor made the ass-

essment. Since then the State Board of Tax Commissioners make the assessment. The company turn over to the State Tax Board a statement showing the number of miles of right of way that the Northern Pacific has, and its various branches,—the length of track and the various classes of track. They turn it over and it is assessed as right of way, so many miles of track.

Referring to the statement for the year 1892, an old statement, that says 48 miles of track plus 4424 feet; that means so many miles of main track in Spokane County, and the assessor assessed as a whole, so many miles of main line track. I don't know how it was in 1892 as to taxing separately what is known as Railroad Street—I am unable to find that it was paid other than as I said. In 1902 we made a general return, showing the length of main track and side track in Spokane County. The details of this show the length of track within the incorporated limits of Spokane, both main track and side track. In addition we returned to the assessor a statement showing such portions of the right of way as were under lease. The state had provided that such portions of the right of way as might be used for commercial purposes could be assessed separately. That is what has been done since 1902, and a few years prior to that. We paid taxes on so many miles of track lumped at a certain sum, and in addition to that a separate valuation was put on each of these tracts of land, and then we charged that up against the lessee in practically all cases.

REDIRECT EXAMINATION.

BY MR. CANNON:

The map I hold in my hand shows the property that the Northern Pacific has claimed since 1906. It is on file in the City Engineer's Office, in the County Assessor's office, and also in the office of the State Tax Commissioners. Northern Pacific ownership is shown in red. The green means property that was lost by the Ely decision. This map was made after the Ely decision, and property classified accordingly.

Defendant then offered in evidence the map referred to, marked DEFENDANT'S EXHIBIT 50. Exhibit rejected.

WITNESS EXCUSED.

T. W. TOLMAN. Recalled, testified as follows:

DIRECT EXAMINATION.

BY MR. CANNON:

I have here a photograph of the John Morrell property on the north side of the right of way, taken from Lincoln Street, looking westward. I have also two panoramic views of the city of Spokane, taken Friday, from the hill on the south at the foot of Howard and between Howard and Mill. The picture was taken from the top of the bluff looking north towards the city. I have marked the Northern Pacific depot with an X on both views. The street that is plainest in view here, and directly north, is Howard Street. The next one, a little to the left of that is Mill Street. I have also marked the corner of Riverside and Stevens.

The photographs were then admitted in evidence, and marked DEFENDANT'S EXHIBITS 51, 52 and 53.

WITNESS EXCUSED.

E. J. CANNON. Called and sworn on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

BY MR. GRAVES:

Between the sides of the fill, the concrete structure supporting the fill, and the property line there is left, according to the plans, a space of approximately 14 feet. This space is not to be occupied with a surface track. On the south there is going to be a heavy platform placed at the then level of the car door as it is elevated on the structure, a platform extending to the property on the south. This platform is to be arranged according to their convenience. I can show you one case here. The Spokane Dry Goods Company already has its house constructed so as to take freight in at the second floor. In that case a heavy platform will be extended from the south track of the elevated structure to the second floor. There is nothing on the plan showing platform. We did not establish any uniform plans, because so many people wanted it one way and some another, and so it was left in such a way that if any one wanted a little different arrangement, he could have it. That is the plan though. I have seen them and talked about them and argued their advantage, and all that sort of thing with Mr. Cooper and Mr. Darling, and that is our plan unless someone asks a special arrangement, in which case if we can carry out the special arrangement, he may have it.

CROSS-EXAMINATION.

BY MR. POST:

We have a written agreement about this plan with the Spokane Dry Goods Company. There isn't any-

thing in the ordinance, or in any of these plans or in any agreement on the subject but I know this was the plan before the ordinance was adopted; that is our plan; that is what we are going to do.

MR. TURNER: If any property owner on the south side of the track desires to get advantage from this elevation it can only be by an apron of platform extending across this sixteen feet that is now left; isn't that so, Mr. Cannon?

A. I don't know any other way he can reach his building. But this is on the railroad property, and the railroad will construct it.

Q. So that would absolutely shut out the lower floors so far as light and air are concerned?

A. Some of them along there have talked of chutes, to shoot the goods down to the first floor, but I don't think that would work very well. They have that option if they want to.

WITNESS EXCUSED.

The defendant then offered in evidence a certified copy of the records of the city council of the City of Spokane dated the 15th day of September, 1886. Objected to as irrelevant, immaterial and incompetent, and admitted subject to objection and marked DEFENDANT'S EXHIBIT 54.

Defendant then offered in evidence an extract from the journal of the city council of the City of Spokane Falls, of the meeting held January 5th, 1887. Admitted in evidence and marked DEFENDANT'S EXHIBIT 55.

DEFENDANT RESTS.

REBUTTAL.

NICHOLAS METZGER. Called and sworn in rebuttal, testified as follows:

DIRECT EXAMINATION.

BY MR. POST:

Nicholas Metzger; have lived in Spokane 24 years; am in the fruit and vegetable business, wholesale, in connection with H. J. Shinn & Company. I have examined the buildings on the Northern Pacific tracks from Washington Street to Adams Street within the 225 foot strip. Commencing at Washington Street and going west, on the north side, we have the McClintock-Trunkey warehouse, wholesale grocers; that is all in that block. Next across Stevens is Fairbanks-Morse Company. This does a wholesale and retail supplies. The next building is occupied by the Durkin Liquor Company, a wholesale liquor warehouse. The next building is Hughes & Company, plumbing, steam and well supplies, wholesale and retail. The next building is McGowan Brothers, retail hardware. The next is Armour & Company, wholesale meats. The next is Powell-Sanders, wholesale grocers. Next O'Callahan-Ehllinger Company, wholesale merchandise brokers. Next Ryan & Newton, wholesale fruits and produce. That is at Post Street. Then going across Post Street, Crane Company, wholesale and retail plumbing supplies. Next Polson Implement Company, wholesale and retail implements and vehicles. Next John Morrell & Company, wholesale meats. Next E. P. Jamison & Company, wholesale and retail railway supplies and contractors' equipment. Next International Harvester Company, wholesale and retail agricultural im-

plements. Next the Washington Machinery & Supply Company, wholesale and retail machinery. Next the Washington Rubber Company, wholesale rubber goods. Then the Spokane Paint & Oil Company, wholesale and retail paints, oils, sash and doors.

Taking the south side of the track, and beginning at Washington Street, the first building is the Falls City Mill & Feed Company, wholesale and retail flour and feed. The next building is a storage building and warehouse of the Spokane Falls Gas Company. The next building is empty, formerly occupied by a commission house. The next building is the United Iron Works, wholesale and retail machinery. The next is the Johnson-Lever warehouse, wholesale machinery brokers, and in the same building the Berlin Machine Works carry a stock of machinery. They sell at wholesale and retail. The next building is the house of W. P. Fuller & Company, paints, oils, sash and doors. The next building is Holley-Mason Company, wholesale and retail hardware. Across Howard Street is H. J. Shinn & Company, wholesale fruits and produce. The next building is the Hallidie Machinery, wholesale and retail machinery. The next is the Spokane Drug Company, wholesale drugs. The next is McGowan Brothers' storage warehouse, storage of hardware. The next building is vacant. The next building is the Kiernan property. It is three stories; one room is vacant, another occupied by a transfer company and another room by Gray & Company, retail plumbing house. The next building is occupied by railroad contractors. The next is the Monarch Oil Refining Company, retail, automobile oil. The next build-

ing is vacant. The next building is the Seehorn Storage & Transfer Company, storage building. The next is the Spokane Dry Goods Company, wholesale dry goods. The next building is D. H. Anderson & Company, wholesale fruits, and next Uhden, wholesale fruits and produce. The next building is the Nott-Atwater Company, wholesale and retail leather and rubber goods. Across Monroe, the next building is D. Holzman & Company, wholesale liquors. Next a storage house for hardware. Next is the Kelley-Clarke Company, wholesale merchandise brokers. Next the Rumley Products Company, wholesale and retail, saw-mill and woodworking machinery. Next comes F. T. Crowe & Company, wholesale and retail building supplies. Next a wholesale hide and fur depot. Next a storage warehouse. Next a wholesale fur and hide depot. Next the Seattle Brewing & Malting Company, wholesale beer warehouse. Next on the corner of Jefferson is a storage warehouse of Hughes & Company, plumbing. Next is F. S. Harmon & Company, wholesale furniture.

WITNESS EXCUSED.

PLAINTIFFS REST.

It is stipulated that the above and foregoing is an accurate condensation of the evidence taken in the above named consolidated cases, and together with the original exhibits, constitutes all the evidence taken in the said cases, and that the same may be approved by Court or Judge thereof; also that the said condensation, together with the originals of the exhibits, the pleadings in the cases, orders, judgments and decrees, and the several papers evidencing the steps taken to

perfect an appeal, shall constitute the record on appeal in the several consolidated cases.

Dated at Spokane, Washington, this — day of August, 1913.

(Signed) TURNER & GERAGHTY,

(Signed) POST, AVERY & HIGGINS,

Attorneys for Plaintiffs.

(Signed) GRAVES, KIZER & GRAVES,

(Signed) EDWARD J. CANNON,

Attorneys for Defendant.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WASHINGTON.—SS.

The foregoing statement, in a simple and condensed form, of the evidence taken in the above entitled cause, being a true and complete statement of said evidence, and properly prepared, is hereby approved.

Dated this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN,

Judge of the District Court of the United States, for
the Eastern District of Washington, Northern
Division.

Endorsements: Statement of Facts.

Filed September 26, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NO. 1580.

H. A. & L. D. HOLLAND COMPANY, A CORPORATION,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Defendant.

NO. 1581.

GEORGE TURNER AND BERTHA TURNER,
HUSBAND AND WIFE,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Defendant.

NO. 1582.

H. J. SHINN AND PHOEBE SHINN, HUSBAND
AND WIFE,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Defendant.

NO. 1586.

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN, HUSBAND AND WIFE,

*Plaintiffs.**vs.*

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

Turner & Geraghty and Post, Avery & Higgins, for
Plaintiffs.

Cannon, Ferris & Swan and Graves, Kizer &
Graves, for Defendant.

RUDKIN, District Judge. These several bills were
filed by the owners of certain lots abutting on Rail-
road Street in the City of Spokane to restrain the
Northern Pacific Railway Company from elevating its
tracks in Railroad Street in front of their property,
and for other appropriate relief. By consent of parties
the suits were consolidated for the purposes of trial,
and the record made at the hearing discloses sub-
stantially the following facts:

By the first section of the Act of Congress of July
2, 1864, (13 Stat., 365) the Northern Pacific Railroad
Company was created a corporation and was em-
powered to construct and maintain a continuous rail-
road and telegraph line from a point on Lake Superior
to some point on Puget Sound. By the second and
third sections of the act it was provided, among other
things, as follows:

Sec. 2. *And be it further enacted*, That the right
of way through the public lands be, and the same is
hereby, granted to said Northern Pacific Railroad

Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables and water stations; and the right of way shall be exempt from taxation within the territories of the United States * * *."

Sec. 3. "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed

in the office of the commissioner of the general land office."

The railroad company signified its acceptance as provided in the act, and on the 4th day of October, 1880, the line of the road was definitely fixed through the north half of Section 19, Township 25, North of Range 43, East of the Willamette Meridian, and a plat thereof filed in the office of the commissioner of the general land office. At that time the United States had full title to the north half of section nineteen and the same was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption and other claims or rights. On the 20th day of January, 1881, the company, through its agent and general superintendent, filed a town plat of Railroad Addition to Spokane Falls, which embraced the half section in question. The line of road as definitely located ran in an easterly and westerly direction through the center of this plat. The tract of land thus platted is four blocks in width, extending from Sprague Avenue on the north to Third Avenue on the south, and approximately ten blocks in length, extending from Washington Street on the east to Cedar Street on the west. There is a strip of land on the plat designated as "Railroad St.," 225.7 feet in width and extending through the plat from east to west. The main line of the railroad was indicated on this plat with two sidetracks two blocks in length on either side near the depot, which was situate on Lincoln Street about the center of the plat east and west and about the center of Railroad Street. The dedicatory language of the plat reads as follows:

“The streets shown by said plat are dedicated to be used by the public until lawfully vacated except that strip of land 225.7 feet in width designated as Railroad Street which is reserved for the tracks and use of said railroad company.”

In the latter part of the year 1881 the railroad was constructed along the line of definite location about the center of Railroad Street, with two short sidetracks near the depot, as indicated on the plat of Railroad Addition, and little further use was made of the street by the railroad company until after the town was destroyed by fire in the year 1889. At the time the plat was filed the town contained a population of from three to five hundred, at the time of the fire in 1889, a population of from twelve to fifteen thousand, and at the time of the trial a population estimated at one hundred and twenty-five thousand. Prior to the fire the business portion of the town was located almost wholly, if not entirely, north of Railroad Street. Soon after the construction of the railroad a number of buildings were erected upon the tier of lots facing Railroad Street on the south and fronting on the railroad track, including one or more hotels, lodging houses, saloons, restaurants, barber shops, and so forth. The location of these buildings with reference to the lot lines on Railroad Street does not very clearly appear from the testimony. Upon the tier of lots facing Railroad Street on the north were a few residences, some of which at least fronted upon Railroad Street. In the early history of the town Howard Street was practically the only cross street open to public travel, and those having business with the rail-

road company from the town passed south on Howard Street to its intersection with Railroad Street, and thence westerly along Railroad Street to the depot, a distance of about two blocks. Those residing or having business places fronting on Railroad Street used the street for the purpose of ingress and egress to and from their residence or place of business. Railroad Street was thus used by the general public, and by whomsoever wished to pass over it, from the year 1881 until the year 1889 for a distance of five or six blocks, and I might add in passing that other vacant property in the vicinity was used for the like purpose and in substantially the same manner. Since the year 1889 the street has been used but little except by those having business directly with the Railroad Company in loading or unloading freight. Since that time the tier of lots on the south side of the street has been built up almost solid, principally with warehouses and wholesale houses, although some retail business is transacted by houses having a frontage on the cross streets. A sidetrack runs along in front of these business houses a few feet distant therefrom, and the buildings usually have a platform in front extending to the sidetrack for the purpose of receiving freight. Commencing in the year 1891 the railroad company began to lease the northerly one hundred feet of Railroad Street for wholesale and warehouse purposes and at the present time the greater part of the northerly one hundred feet of the street through this addition is occupied by brick buildings from two to four stories in height constructed at a cost of many thousand dollars. So far as the record discloses the public authorities of

the City of Spokane have never asserted any rights in Railroad Street, or exercised any control or supervision over it. On the contrary they have levied special assessments against the property in the so-called street for street improvements from time to time and the railroad right of way has always been taxed for state, county and municipal purposes. Portions of the northerly one hundred feet of the street have been occupied and blockaded by buildings, for a period of more than twenty years, without any protest on the part of the city and with only an occasional protest on the part of an abutting property owner who took no legal steps to protect his rights in the street, if any such he had. That portion of Railroad Street not occupied by buildings is, at the present time, very largely occupied by railroad tracks, as will appear from an inspection of the numerous photographs and plats received in evidence. There are upwards of one hundred train movements daily at the different street crossings in the City of Spokane, and at some of these crossings public travel is impeded and human life endangered to a greater or less extent. Under these circumstances, on the 6th day of February, 1912, the City of Spokane by ordinance directed and ordered the Northern Pacific Railway Company (successor in interest to the Northern Pacific Railroad Company) to separate its grade from the street grades of the city between Sprague Avenue and Division Street on the east and Sixth Avenue on the west, (which includes the entire distance through Railroad Addition). This the railroad company proposes to accomplish by a dirt fill approximately fifteen feet in height and eighty-five feet

in width, sustained by retaining walls of concrete or stone masonry on either side. To prevent the elevation of the tracks and the obstruction of Railroad Street in this manner in front of their several lots the plaintiffs have instituted these suits as already stated.

Under the foregoing facts the plaintiffs contend that Railroad Street is a public highway, first, by statutory dedication, second, by common law dedication, and third, by estoppel. The defendant on the other hand contends that there has been no dedication, either common law or statutory, and furthermore, that its predecessor in interest could not lawfully make such a dedication under the implied limitations contained in the grant of its right of way from the federal government. The legal status of this strip of land is therefore the principal question in the case. If it is a public street it is conceded that the municipality could not give it over to the exclusive use and occupation of the railway company, and such would be the necessary effect of elevating the tracks according to the plan above outlined.

State, ex rel Schade Brewing Co. v.

Superior Court, 62 Wash., 96.

If, on the other hand, it is the private right of way of the railway company it may lawfully elevate its tracks therein against the will and protests of abutting property owners, and if they suffer injury therefrom they have their right of action at law. The latter is their only remedy for the damages are entirely too remote, uncertain and speculative to warrant a court of

equity in granting injunctive relief in advance of the change.

If there has been no dedication of this strip of land called Railroad Street to the use of the public, the power of the railroad company to make such a dedication is not necessarily involved in these cases, but nevertheless the nature of the company's right of way acquired under the act of Congress, and the limitations upon its use imposed by Congress, may well be taken into consideration in determining the ultimate question at issue, viz., the question of dedication or no dedication.

In *Northern Pacific Railroad Co. v. Smith*, 171 U. S., 261, 275, the court said:

“By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.

The doctrine of that case was reaffirmed in *Northern Pacific Railway Co. v. Townsend*, 190 U. S., 267, the court declaring that neither courts nor juries, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad, and title to it has vested in whomsoever chooses to occupy the same. The court further said:

“Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose; one which negated the existence of the power to voluntarily alienate the right of way

or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the ultimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted * * *. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the Act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

At the same time it was not denied that the right of way granted through the public domain within a state was amenable to the police power of the state, the court saying:

"Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claims of adverse ownership for private use."

If the authority of the railroad company to dispose

of any part of its right of way of its own volition is measured by what it may be compelled to do under the police power of the state—and in my opinion its authority is thus restricted—the company was without authority to devote its entire right of way across the prairie for a distance of ten blocks to the use of the public for a public street, reserving to itself only the right to operate its tracks over the street. It seems manifest that under the laws of the state the entire right of way of the railroad company could not be condemned for a public street, leaving to the company only the limited right to operate its trains therein, thus converting what is to all intents and purposes a fee simple title into a mere license from municipal authorities.

North Coast R. Co. v. Northern Pac. R. Co., 48 Wash., 529, falls far short of supporting any such doctrine.

I am therefore of opinion that it was without the power of the company to dedicate its entire right of way as a public street, and that such a dedication would be utterly void if attempted. Nor can I agree with counsel that the railway company holds its right of way through odd sections by any other or different tenure from that by which it holds its right of way in even sections, or that it has any greater authority to dispose of the one part than of the other. The Act of 1864 contains two separate and distinct grants, the one of the right of way, and the other of land in aid of the construction of the road, and the one grant is not dependent upon or merged in the other.

Railroad Co. v. Baldwin, 103 U. S., 426.

The grant of the right of way is an entirety and is held throughout by the same tenure and subject to the same limitations. The statutory dedication made by the railroad company is consistent with this view. There is no magic in the use of the word "street." The entire plat, including the dedication, must be construed together, and when so construed it plainly appears that the strip of land, ill-advisedly designated as a street, was in fact excepted from the dedication and reserved for the tracks and use of the railway company. It is no doubt true that the use of a strip of land as a mere right of way for a railroad is not entirely incompatible with the use of the same strip of land as a public street, but at the same time its use for other legitimate railroad purposes would be. Furthermore, such common user is so impracticable and so hazardous that a court should not readily presume that it was authorized or intended. The use made of this strip of land from 1881 to 1889 was but natural under the circumstances and was wholly insufficient of itself to constitute a common law dedication. The law on that subject is very clearly and concisely stated in the headnotes to *Hogue v. City of Albina*, 10 L. R. A., 673, prepared by Mr. Justice Bean now of the District of Oregon.

"In order to constitute a dedication by parole, there must be some acts proved evidencing a clear intention to dedicate the land to the public use."

"Where it is sought to establish a dedication by the sale of lots with reference to a map or plat, the extent of such dedication is to be determined from a consideration of the whole map, the object being to ascertain

the intention of the donor, the cardinal rule of construction being to give effect to the intention of the party as manifested by his acts."

"A dedication of land to the public use is not presumed, but must appear by acts and declarations of the owner of such a public and deliberate character as clearly show an intention on his part to surrender his land for the use of the public, and the burden of proof is upon the party asserting such dedication."

"In order to constitute a common-law dedication, the owner's acts and declarations must be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the public use."

"When the owner of land lays out a town, and records a plat thereof, on which streets are dedicated to the public, and it is sought to establish another and different dedication by the acts and conduct of the owner, in exhibiting to intending purchasers another map prepared on the same day, and selling lots by reference to the second plat, such second plat, to have this effect, must be essentially different from the recorded one, showing on its face an intention on the part of the owner to make an additional dedication."

The sale of lots with reference to the plat in question does not create an estoppel. For while the plat showed Railroad Street it also showed plainly that it was not a street in fact, but was excepted and reserved for the tracks and use of the railway company. Indeed it would be far easier to raise an estoppel against the property owners who have stood by during all these years while permanent and lasting im-

provements were under way at great expense on property which they now lay claim to as a public street.

It was suggested in argument that the grade separation ordinance is void because in conflict with the Public Service Commission Act of 1911 (Laws 1911, chap. 117). That question is now pending before the Supreme Court of the state and I will not discuss it as I do not deem it of vital importance here. I might suggest, however, that a change in railroad grades through a city will often unavoidably necessitate a change in the grades of the streets as well, and to confer jurisdiction upon a state board over the one would in a measure confer jurisdiction over the other. And to confer jurisdiction upon a state board over the streets of a city would be so far inconsistent with our preconceived notions of local self government that the statute should not be given that construction if any other construction is permissible.

To discuss the questions of evidence presented in argument, or to attempt a further review of the authorities cited would extend this opinion to an inordinate length with no corresponding benefits. I will only add in conclusion that after a full and painstaking consideration of the case I am convinced that the bills are without substantial equity and they are accordingly dismissed.

Endorsements: Opinion.

Filed May 31, 1913.

W. H. HARE, Clerk.

By Frank C. NASH, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

NO. 1580.

H. A. & L. D. HOLLAND COMPANY, A COR-
PORATION,

Plaintiff.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

JUDGMENT OF DISMISSAL.

This bill coming regularly on to be heard for trial before the above-entitled court on the 12th day of May, A. D., 1913, and the plaintiff being represented in court by its attorneys, Turner & Geraghty and Post, Avery & Higgins, and the defendants being represented in court by its attorneys, Cannon, Ferris & Swan, and Graves, Kizer & Graves, and the court having jurisdiction of the parties and in the premises, and having heard the evidence adduced at the trial, and being fully advised in the premises, and it appearing to the court after a full and painstaking consideration of the case that the said bill is without substantial equity, and the court having heretofore and to-wit, on or about the 31st day of May, 1913, filed its written decision herein, and defendant having now appeared and moved that judgment be entered herein according to said decision.

It is, therefore, hereby ORDERED, ADJUDGED and DECREED that the above-entitled cause be and the same is hereby dismissed with prejudice, and that

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defendant have judgment against plaintiff for its costs and disbursements herein to be taxed.

Done in open Court this 15th day of July, A. D., 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Judgment of Dismissal.

Filed July 15, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

NO. 1581.

GEORGE TURNER AND BERTHA TURNER,
HUSBAND AND WIFE,

vs.

Plaintiffs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY, A CORPORATION,

Defendant.

JUDGMENT OF DISMISSAL.

This bill coming regularly on to be heard for trial before the above-entitled court on the 12th day of May, A. D., 1913, and the plaintiffs being represented in court by their attorneys, Turner & Geraghty and Post, Avery & Higgins, and the defendant being represented in court by its attorneys, Cannon, Ferris & Swan, and Graves, Kizer and Graves, and the court having jurisdiction of the parties and in the premises, and having heard the evidence adduced at the trial, and being fully advised in the premises, and it appear-

ing to the court after a full and painstaking consideration of the case that the said bill is without substantial equity, and the court having heretofore and to-wit, on or about the 31st day of May, 1913, filed its written decision herein, and defendant having now appeared and moved that judgment be entered herein according to said decision.

It is, therefore, hereby ORDERED, ADJUDGED and DECREED that the above-entitled cause be and the same is hereby dismissed with prejudice, and that defendant have judgment against plaintiffs for its costs and disbursements herein to be taxed.

Done in open Court this 15th day of July, A. D., 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Judgment of Dismissal.

Filed July 15, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

NO. 1582.

H. J. SHINN AND PHOEBE SHINN, HUSBAND
AND WIFE,

Plaintiffs.

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY, A CORPORATION,

Defendant.

JUDGMENT OF DISMISSAL.

This bill coming regularly on to be heard for trial before the above-entitled court on the 12th day of May, A. D., 1913, and the plaintiffs being represented in court by their attorneys, Turner & Geraghty and Post, Avery & Higgins, and the defendant being represented in court by its attorneys, Cannon, Ferris & Swan, and Graves, Kizer & Graves, and the court having jurisdiction of the parties and in the premises, and having heard the evidence adduced at the trial, and being fully advised in the premises, and it appearing to the court after a full and painstaking consideration of the case that the said bill is without substantial equity, and the court having heretofore and to-wit, on or about the 31st day of May, 1913, filed its written decision herein, and defendant having now appeared and moved that judgment be entered herein according to said decision.

It is, therefore, hereby ORDERED, ADJUDGED and DECREED that the above-entitled cause be and the same is hereby dismissed with prejudice, and that defendant have judgment against plaintiffis for its costs and disbursements herein to be taxed.

Done in open Court this 15th day of July, A. D., 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Judgment of Dismissal.

Filed July 15th, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

NO. 1586.

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN, HUSBAND AND WIFE,

Plaintiffs.

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY, A CORPORATION,

Defendant.

JUDGMENT OF DISMISSAL.

This bill coming regularly on to be heard for trial before the above-entitled court on the 12th day of May, A. D., 1913, and the plaintiffs being represented in court by their attorneys, Turner & Geraghty and Post, Avery & Higgins, and the defendant being represented in court by its attorneys, Cannon, Ferris & Swan and Graves, Kizer & Graves, and the court having jurisdiction of the parties and in the premises, and having heard the evidence adduced at the trial, and being fully advised in the premises, and it appearing to the court after a full and painstaking consideration of the case that the said bill is without substantial equity, and the court having heretofore and to-wit, on or about the 31st day of May, 1913, filed its written decision herein, and defendant having now appeared and moved that judgment be entered herein according to said decision.

It is, therefore, hereby ORDERED, ADJUDGED and DECREED that the above-entitled cause be and the same is hereby dismissed with prejudice, and that defendant have judgment against plaintiffs for its costs and disbursements herein to be taxed.

Done in open Court this 15th day of July, A. D.,
1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Judgment of Dismissal.

Filed July 15, 1913.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1580.

H. A. & L. D. HOLLAND COMPANY, A COR-
PORATION,

Plaintiff.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the plaintiff in the above entitled cause and says that in the decree herein made and entered on the 15th day of July, 1913, there is manifest error, and files the following assignment of errors committed and happening in the said cause upon which it will rely in its appeal from said decree:

1. The Court erred in holding that the Northern Pacific Railroad Company was without power to dedicate a part of its right of way, granted to it by section 2 of the Act of Congress entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on

the Pacific Coast, by the Northern Route," approved July 2, 1864, as a public street, and hence that it had never lawfully dedicated Railroad Street, in the City of Spokane, as a public street, as alleged in the Bill of Complaint.

2. The Court erred in holding that the strip of land designated as "Railroad Street" upon the plat of Railroad Addition to Spokane Falls, is not and never was a public street or highway.

3. The Court erred in holding that the Northern Pacific Railroad Company did not dedicate a public street or highway by and in its plat of Railroad Addition to Spokane Falls, executed and filed by it, as to that strip of land designated thereon as "Railroad Street."

4. The Court erred in holding that the Northern Pacific Railroad Company was without power to dedicate that strip of land designated upon said plat of Railroad Addition to Spokane Falls as "Railroad Street" or any part thereof, as a public street or highway, or to give the plaintiff, or any other purchasers of land from it, abutting upon said "Railroad Street," any easement or other right therein.

5. The Court erred in holding that the said Northern Pacific Railroad Company, and its successors, held the right of way granted by section 2 of the said act of congress, through odd sections of lands by no other or different tenure from that by which it held its right of way through even numbered sections.

6. The Court erred in holding as matter of law that the limited fee granted the Northern Pacific Railroad Company by section 2 of the said act of congress for purposes of right of way had not merged in the

full, perfect and unlimited fee granted to the said Company under section 3 of the said act of congress to aid in the building of its lines of railroad when title to said odd numbered sections had been earned by it and became fully vested in it.

7. The Court erred in holding that the grant of the right of way made by the said act of congress was an entirety and was held throughout, that is, through odd and even sections of public land, by the same tenure and subject to the same limitations.

8. The Court erred in not holding that a full, perfect and unlimited fee simple title to the public lands granted to the Northern Pacific Railroad Company by section 3 of the said act of congress had vested in it before the vesting in it of title to its right of way granted by section 2 of said act of congress, and hence, that the implied limitations on the power to alienate or dedicate any part of its right of way had no application to such parts of its right of way as extended through odd numbered sections of land.

9. The Court erred in holding and finding that the strip of land described on the plat of Railroad Addition to Spokane Falls as "Railroad Street" was in fact excepted from the dedication of streets made by the said plat and reserved wholly and entirely for the tracks and use of the Northern Pacific Railroad Company.

10. The Court erred in holding that the Northern Pacific Railroad Company did not intend to dedicate Railroad Street, as described upon its said plat of Railroad Addition to Spokane Falls as a public street or highway, or to grant or convey to the purchasers

of property abutting upon said Railroad Street, any easement or other right in and to said Railroad Street.

11. The Court erred in holding and finding that the use made by the public of the strip of land called "Railroad Street" from 1881 to 1889 with the consent and acquiescence of the Northern Pacific Railroad Company was wholly insufficient to constitute a common law dedication of said strip of land as a public street.

12. The Court erred in holding and finding that the sale of lots with reference to the plat of Railroad Addition, shown by the testimony, did not create an estoppel in favor of the grantees of said lots and their successors against the Northern Pacific Railroad Company and its successors to deny that Railroad Street as described in the Bill of Complaint was and is one of the public streets of the City of Spokane.

13. The Court erred in holding that the plaintiff does not now have and never did have any easement or other right or title in and to that strip of land designated as "Railroad Street" upon the plat of Railroad Addition to Spokane Falls, or in or to any part thereof.

14. The Court erred in holding that plaintiff's bill was without substantial equity, and in dismissing the same, and denying the relief therein prayed for.

(Signed) H. A. & L. D. HOLLAND COMPANY,
Plaintiff,

By TURNER & GERAGHTY.
POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

Endorsements: Assignment of Errors.

Service of the within Assignment of Errors by receipt of a true copy thereof, admitted this 25th day of Sept., 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Defendant.

Filed Sept. 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

NO. 1581.

GEORGE TURNER AND BERTHA TURNER,
Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ASSIGNMENT OF ERRORS.

Come now the plaintiffs in the above entitled cause and say that in the decree herein made and entered on the 15th day of July, 1913, there is manifest error, and file the following assignment of errors committed and happening in the said cause upon which they will rely in their appeal from said decree.

1. The Court erred in holding that the Northern Pacific Railroad Company was without power to dedicate a part of its right of way, granted to it

by section 2 of the act of congress entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," approved July 2, 1864, as a public street, and hence that it had never lawfully dedicated Railroad Street in the City of Spokane as a public street; as alleged in the Bill of Complaint.

2. The Court erred in holding that the strip of land designated as 'Railroad Street' upon the plat of Railroad Addition to Spokane Falls, is not and never was a public street or highway.

3. The Court erred in holding that the Northern Pacific Railroad Company did not dedicate a public street or highway by and in its plat of Railroad Addition to Spokane Falls, executed and filed by it, as to that strip of land designated thereon as "Railroad Street."

4. The Court erred in holding that the Northern Pacific Railroad Company was without power to dedicate that strip of land designated upon said plat of Railroad Addition to Spokane Falls as "Railroad Street" or any part thereof, as a public street or highway, or to give the plaintiffs, or any other purchasers of land from it, abutting upon said "Railroad Street," any easement or other right therein.

5. The Court erred in holding that the said Northern Pacific Railroad Company, and its successors, held the right of way granted by section 2 of the said act of congress, through odd sections of lands by no other or different tenure from that by which it held its right of way through even numbered sections.

6. The Court erred in holding as matter of law that the limited fee granted the Northern Pacific Railroad Company by section 2 of the said act of congress for purposes of right of way had not merged in the full, perfect and unlimited fee granted to the said Company under section 3 of the said act of congress to aid in the building of its lines of railroad when title to said odd numbered sections had been earned by it and became fully vested in it.

7. The Court erred in holding that the grant of the right of way made by the said act of congress was an entirety and was held throughout, that is, through odd and even sections of public land, by the same tenure and subject to the same limitations.

8. The Court erred in not holding that a full, perfect and unlimited fee simple title to the public lands granted to the Northern Pacific Railroad Company by section 3 of the said act of congress had vested in it before the vesting in it of title to its right of way granted by section 2 of said act of congress, and hence, that the implied limitations on the power to alienate or dedicate any part of its right of way had no application to such parts of its right of way as extended through odd numbered sections of land.

9. The Court erred in holding and finding that the strip of land described on the plat of Railroad Addition to Spokane Falls as "Railroad Street" was in fact excepted from the dedication of streets made by the said plat and reserved wholly and entirely for the tracks and use of the Northern Pacific Railroad Company.

10. The Court erred in holding that the Northern Pacific Railroad Company did not intend to dedicate Railroad Street, as described upon its said plat of Railroad Addition to Spokane Falls, as a public street or highway, or to grant or convey to the purchasers of property abutting upon said Railroad Street, any easement or other right in and to said Railroad Street.

11. The Court erred in holding and finding that the use made by the public of the strip of land called "Railroad Street" from 1881 to 1889 with the consent and acquiescence of the Northern Pacific Railroad Company was wholly insufficient to constitute a common law dedication of said strip of land as a public street.

12. The Court erred in holding and finding that the sale of lots with reference to the plat of Railroad Addition, shown by the testimony, did not create an estoppel in favor of the grantees of said lots and their successors against the Northern Pacific Railroad Company and its successors to deny that Railroad Street as described in the Bill of Complaint was and is one of the public streets of the City of Spokane.

13. The Court erred in holding that the plaintiffs do not now have and never did have any easement or other right or title in and to that strip of land designated as "Railroad Street, upon the plat of Railroad Addition to Spokane Falls, or in or to any part thereof.

14. The Court erred in holding that plaintiffs' bill was without substantial equity, and in dismissing the same, and denying the relief therein prayed for.

(Signed) GEORGE TURNER AND BERTHA
TURNER,

Plaintiffs,

By TURNER & GERAGHTY.

POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

Endorsements: Assignment of Errors.

Service of the within Assignment of Errors, by receipt of a true copy thereof, admitted this 25th day of Sept., 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Defendant.

Filed Sept. 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

NO. 1582.

H. J. SHINN AND WIFE PHOEBE SHINN,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ASSIGNMENT OF ERRORS.

Come now the plaintiffs in the above entitled cause and say that in the decree herein made and entered on the 15th day of July, 1913, there is manifest error, and file the following assignment of errors committed

and happening in the said cause upon which they will rely in their appeal from said decree:

1. The Court erred in holding that the Northern Pacific Railroad Company was without power to dedicate a part of its right of way, granted to it by section 2 of the act of congress entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route," approved July 2, 1864, as a public street, and hence that it had never lawfully dedicated Railroad Street in the City of Spokane as a public street, as alleged in the Bill of Complaint.

2. The Court erred in holding that the strip of land designated as "Railroad Street" upon the plat of Railroad Addition to Spokane Falls, is not and never was a public street of highway.

3. The Court erred in holding that the Northern Pacific Railroad Company did not dedicate a public street or highway by and in its plat of Railroad Addition to Spokane Falls, executed and filed by it, as to that strip of land designated thereon as "Railroad Street."

4. The Court erred in holding that the Northern Pacific Railroad Company was without power to dedicate that strip of land designated upon said plat of Railroad Addition to Spokane Falls as "Railroad Addition to Spokane Falls as "Railroad Street" or any part thereof, as a public street or highway, or to give the plaintiffs, or any other purchasers of land from it, abutting upon said "Railroad Street," any easement or other right therein.

5. The Court erred in holding that the said Northern Pacific Railroad Company, and its successors, held the right of way granted by section 2 of the said act of congress, through odd sections of lands by no other or different tenure from that by which it held its right of way through even numbered sections.

6. The Court erred in holding as matter of law that the limited fee granted the Northern Pacific Railroad Company by section 2 of the said act of congress for purposes of right of way had not merged in the full, perfect and unlimited fee granted to the said Company under section 3 of the said act of congress to aid in the building of its lines of railroad when title to said odd numbered sections had been earned by it and became fully vested in it.

7. The Court erred in holding that the grant of the right of way made by the said act of congress was an entirety and was held throughout, that is, through odd and even sections of public land, by the same tenure and subject to the same limitations.

8. The Court erred in not holding that a full, perfect and unlimited fee simple title to the public lands granted to the Northern Pacific Railroad Company by section 3 of the said act of congress and vested in it before the vesting in it of title to its right of way granted by section 2 of said act of congress, and hence that the implied limitations on the power to alienate or dedicate any part of its right of way had no application to such parts of its right of way as extended through odd numbered sections of land.

9. The Court erred in holding and finding that the strip of land described on the plat of Railroad

Addition to Spokane Falls as "Railroad Street" was in fact excepted from the dedication of streets made by the said plat and reserved wholly and entirely for the tracks and use of the Northern Pacific Railroad Company.

10. The Court erred in holding that the Northern Pacific Railroad Company did not intend to dedicate Railroad Street, as described upon its said plat of Railroad Addition to Spokane Falls, as a public street or highway, or to grant or convey to the purchasers of property abutting upon said Railroad Street, any easement or other right in and to said Railroad Street.

11. The Court erred in holding and finding that the use made by the public of the strip of land called "Railroad Street" from 1881 to 1889 with the consent and acquiescence of the Northern Pacific Railroad Company was wholly insufficient to constitute a common law dedication of said strip of land as a public street.

12. The Court erred in holding and finding that the sale of lots with reference to the plat of Railroad Addition, shown by the testimony, did not create an estoppel in favor of the grantees of said lots and their successors against the Northern Pacific Railroad Company and its successors to deny that Railroad Street as described in the Bill of Complaint was and is one of the public streets of the City of Spokane.

13. The Court erred in holding that the plaintiffs do not now have and never did have any easement or other right or title in and to that strip of land designated as "Railroad Street" upon the plat of Rail-

road Addition to Spokane Falls, or in or to any part thereof.

14. The Court erred in holding that plaintiffs' bill was without substantial equity, and in dismissing the same, and denying the relief therein prayed for.

(Signed) H. J. SHINN AND PHOEBE SHINN,
Plaintiffs,

By TURNER & GERAGHTY.
POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

Endorsements: Assignment of Errors.

Service of the within Assignment of Errors, by receipt of a true copy thereof, admitted this 25th day of Sept., 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Defendant.

Filed Sept. 26, 1913.

W. H. HARE, Clerk.
By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

NO. 1586.

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ASSIGNMENT OF ERRORS.

Come now the plaintiffs in the above entitled cause and say that in the decree herein made and entered on the 15th day of July, 1913, there is manifest error, and file the following assignment of errors committed and happening in the said cause upon which they will rely in their appeal from said decree:

1. The Court erred in holding that the Northern Pacific Railroad Company was without power to dedicate a part of its right of way, granted to it by section 2 of the act of congress entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," approved July 2, 1864, as a public street, and hence that it have never lawfully dedicated Railroad Street in the City of Spokane as a public street, as alleged in the Bill of Complaint.

2. The Court erred in holding that the strip of land designated as "Railroad Street" upon the plat of Railroad Addition to Spokane Falls, is not and never was a public street or highway.

3. The Court erred in holding that the Northern Pacific Railroad Company did not dedicate a public street or highway by and in its plat of Railroad Addition to Spokane Falls, executed and filed by it, as to that strip of land designated thereon as "Railroad Street."

4. The Court erred in holding that the Northern Pacific Railroad Company was without power to dedicate that strip of land designated upon said plat of Railroad Addition to Spokane Falls as "Railroad

Street" or any part thereof, as a public street or highway, or to give the plaintiffs, or any other purchasers of land from it, abutting upon said "Railroad Street," any easement or other right therein.

5. The Court erred in holding that the said Northern Pacific Railroad Company, and its successors, held the right of way granted by section 2 of the said act of congress, through odd sections of lands by no other or different tenure from that by which it held its right of way through even numbered sections.

6. The Court erred in holding as matter of law that the limited fee granted the Northern Pacific Railroad Company by section 2 of the said act of congress for purposes of right of way had not merged in the full, perfect and unlimited fee granted to the said Company under section 3 of the said act of congress to aid in the building of its lines of railroad when title to said odd numbered sections had been earned by it and became fully vested in it.

7. The Court erred in holding that the grant of the right of way made by the said act of congress was an entirety and was held throughout, that is, through odd and even sections of public land, by the same tenure and subject to the same limitations.

8. The Court erred in not holding that a full, perfect and unlimited fee simple title to the public lands granted to the Northern Pacific Railroad Company by section 3 of the said act of congress and vested in it before the vesting in it of title to its right of way granted by section 2 of said act of congress, and hence, that the implied limitations on the power to alienate or

dedicate any part of its right of way had no application to such parts of its right of way as extended through odd numbered sections of land.

9. The Court erred in holding and finding that the strip of land described on the plat of Railroad Addition to Spokane Falls as "Railroad Street" was in fact excepted from the dedication of streets made by the same plat and reserved wholly and entirely for the tracks and use of the Northern Pacific Railroad Company.

10. The Court erred in holding that the Northern Pacific Railroad Company did not intend to dedicate Railroad Street, as described upon its said plat of Railroad Addition to Spokane Falls, as a public street or highway, or to grant or convey to the purchasers of property abutting upon said Railroad Street, any easement or other right in and to said Railroad Street.

11. The Court erred in holding and finding that the use made by the public of the strip of land called "Railroad Street" from 1881 to 1889 with the consent and acquiescence of the Northern Pacific Railroad Company was wholly insufficient to constitute a common law dedication of said strip of land as a public street.

12. The Court erred in holding and finding that the sale of lots with reference to the plat of Railroad Addition, shown by the testimony, did not create an estoppel in favor of the grantees of said lots and their successors against the Northern Pacific Railroad Company and its successors to deny that Railroad Street as described in the Bill of Complaint was and is one of the public streets of the City of Spokane.

13. The Court erred in holding that the plaintiffs do not now have and never did have any easement or other right or title in and to that strip of land designated as "Railroad Street" upon the plat of Railroad Addition to Spokane Falls, or in or to any part thereof.

14. The Court erred in holding that plaintiffs' bill was without substantial equity, and in dismissing the same, and denying the relief therein prayed for.

(Signed) W. H. KIERNAN AND CHRISTINE B. KIERNAN,

Plaintiffs,

By TURNER & GERAGHTY.

POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

Endorsements: Assignment of Errors.

Service of the within Assignment of Errors, by receipt of a true copy thereof, admitted this 25th day of Sept., 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Defendant.

Filed Sept. 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1580.

H. A. & L. D. HOLLAND COMPANY, A COR-
PORATION,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

PETITION FOR APPEAL.

The above named plaintiff, H. A. & L. D. Holland Company, a corporation, conceiving itself to be aggrieved by the final decree, order and judgment entered in the above entitled cause on the 15th day of July, 1913, hereby appeals therefrom, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit. It prays that this its appeal be allowed, and that a transcript of the record, proceedings and papers upon which said final decree, order and judgment was made, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

And now at the time of the filing of this petition for appeal, the plaintiff files an assignment of errors, setting forth separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

(Signed) H. A. & L. D. HOLLAND COMPANY,
Plaintiff.

By TURNER & GERAGHTY,
POST, AVERY & HIGGINS,
Its Solicitors.

Endorsements: Petition for Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. NASH, Deputy.

Service of within petition for appeal, by receipt of a true copy thereof, admitted this 25th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Defendant.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1581.

GEORGE TURNER AND BERTHA TURNER,
Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

PETITION FOR APPEAL.

The above named plaintiffs, George Turner and Bertha Turner, conceiving themselves to be aggrieved by the final decree, order and judgment entered in the above entitled cause on the 15th day of July, 1913, hereby appeal therefrom, and from the whole thereof,

to the United States Circuit Court of Appeals for the Ninth Circuit. They pray that this their appeal be allowed, and that a transcript of the record, proceedings and papers upon which said final decree, order and judgment was made, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

And now at the time of the filing of this petition for appeal, the plaintiffs file an assignment of errors, setting forth separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

(Signed) GEORGE TURNER AND BERTHA
TURNER,

Plaintiffs.

By TURNER & GERAGHTY,
POST, AVERY & HIGGINS,
Solicitors for Plaintiffs.

Endorsements: Petition for Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. NASH, Deputy.

Service of the within petition for appeal, by receipt of true copy thereof, admitted this 25th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES,

(Signed) EDWARD J. CANNON,

Solicitors for Defendant.

Endorsements: Petition for Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. NASH, Deputy.

Service of the within Petition for Appeal, by receipt of a true copy thereof, admitted this 25th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

((Signed) EDWARD J. CANNON.

Solicitors for Defendant.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1586.

W. H. KIERNAN AND CHISTINE B. KIERNAN,
Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

PETITION FOR APPEAL.

The above named plaintiffs, W. H. Kiernan and Christine B. Kiernan, conceiving themselves to be aggrieved by the final decree, order and judgment entered in the above entitled cause on the 15th day of July, 1913, hereby appeal therefrom, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit. They pray that this their appeal be allowed, and that a transcript of the record, proceedings and papers upon which said final decree, order and judgment was made, duly authenti-

cated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

And now at the time of the filing of this petition for appeal, the plaintiffs file an assignment of errors, setting forth separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

(Signed) W. H. KIERNAN AND CHRISTINE B.
KIERNAN,

Plaintiffs.

By TURNER & GERAGHTY.
POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

Endorsements: Petition for Appeal.

Filed September 26, 1913.

LL

W. H. HARE, Clerk.

By F. C. NASH, Deputy.

Service of the Within Petition for Appeal, by receipt of a true copy thereof, admitted this 25th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Defendant.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

H. A. & L. D. HOLLAND COMPANY, A COR-
PORATION,

Plaintiff.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ORDER ALLOWING APPEAL.

On this 26th day of September, 1913, came the above named H. A. & L. D. Holland Company, a corporation, plaintiff, by Turner & Geraghty and Post, Avery & Higgins, its solicitors, and moved the Court to allow an appeal from the decree of this Court herein rendered and entered on the 15th day of July, 1913, in favor of the defendant and against the plaintiff, to the United States Circuit Court of Appeals for the Ninth Circuit, and filed the plaintiff's assignment of errors.

On the filing of said assignment of errors by said plaintiff, the Court does hereby allow said appeal, and orders that a certified copy of the record, proceedings and papers upon which said decree appealed from was based or rendered, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit; but inasmuch as the above entitled cause was by stipulation of counsel, in open court, and by order of the Court made thereon, consolidated for purposes of trial and of appeal with the following named causes, to-wit.

George Turner and Bertha Turner vs. Northern Pacific Railway Company, numbered 1581; H. J. Shinn and Phoebe Shinn vs. Northern Pacific Railway Company, numbered 1582, and W. H. Kiernan and Christine B. Kiernan vs. Northern Pacific Railway Company, numbered 1586.

IT IS ORDERED, That the papers on appeal in all the said causes be bound up together as one record and entitled as one consolidated cause, and that the testimony taken on the trial in the said consolidated cause stand as the testimony in the appellate court in each of the said causes.

Done in open Court this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Order Allowing Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

NO. 1581.

GEORGE TURNER AND BERTHA TURNER,
Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ORDER ALLOWING APPEAL.

On this 26th day of September, 1913, came the above

named George Turner and Bertha Turner, plaintiffs, by Turner & Geraghty and Post, Avery & Higgins, their solicitors, and moved the Court to allow an appeal from the decree of this Court herein rendered and entered on the 15th day of July, 1913, in favor of the defendant and against the plaintiffs, to the United States Circuit Court of Appeals for the Ninth Circuit, and filed the plaintiffs' assignment of errors.

On the filing of said assignment of errors by said plaintiffs, the Court does hereby allow said appeal, and orders that a certified copy of the record, proceedings and papers upon which said decree appealed from was based or rendered, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit; but inasmuch as the above entitled cause was by stipulation of counsel, in open court, and by order of the Court made thereon, consolidated for purposes of trial and of appeal with the following named causes, to-wit:

H. A. & L. D. Holland Company vs. Northern Pacific Railway Company, numbered 1580; H. J. Shinn and Phoebe Shinn vs. Northern Pacific Railway Company, numbered 1582, and W. H. Kiernan and Christine B. Kiernan vs. Northern Pacific Railway Company, numbered 1586.

IT IS ORDERED, That the papers on appeal in all the said causes be bound up together as one record and entitled as one consolidated cause, and that the testimony taken on the trial in the said consolidated cause stand as the testimony in the appellate court in each of the said causes.

Done in open Court this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Order Allowing Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington.*

Northern Division.

NO. 1582.

H. J. SHINN AND PHOEBE SHINN,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ORDER ALLOWING APPEAL.

On this 26th day of September, 1913, came the above named H. J. Shinn and Phoebe Shinn, plaintiffs, by Turner & Geraghty and Post, Avery & Higgins, their solicitors, and moved the Court to allow an appeal from the decree of this Court herein rendered and entered on the 15th day of July, 1913, in favor of the defendant and against the plaintiffs, to the United States Circuit Court of Appeals for the Ninth Circuit and filed the plaintiffs' assignment of errors.

On the filing of said assignment of errors by said plaintiffs, the Court does hereby allow said appeal, and orders that a certified copy of the record, proceedings and papers upon which said decree appealed from was

based or rendered, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit; but inasmuch as the above entitled cause was by stipulation of counsel, in open court, and by order of the Court made thereon, consolidated for purposes of trial and of appeal with the following named causes, to-wit:

H. A. & L. D. Holland Company vs. Northern Pacific Railway Company, numbered 1580; George Turner and Bertha Turner vs. Northern Pacific Railway Company, numbered 1581, and W. H. Kiernan and Christine B. Kiernan vs. Northern Pacific Railway Company, numbered 1586.

IT IS ORDERED, That the papers on appeal in all the said causes be bound up together as one record and entitled as one consolidated cause, and that the testimony taken on the trial in the said consolidated cause stand as the testimony in the appellate court in each of the said causes.

Done in open Court this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Order Allowing Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the Eastern District of Washington,
Northern Division.*

NO. 1586.

W. H. KIERNAN AND CHRISTINE B. KIERNAN,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Defendant.

ORDER ALLOWING APPEAL.

On this 26th day of September, 1913, came the above named W. H. Kiernan and Christine B. Kiernan, plaintiffs, by Turner & Geraghty and Post, Avery & Higgins, their solicitors, and moved the Court to allow an appeal from the decree of this Court herein rendered and entered on the 15th day of July, 1913, in favor of the defendant and against the plaintiffs, to the United States Circuit Court of Appeals for the Ninth Circuit and filed the plaintiffs' assignment of errors.

On the filing of said assignment of errors by said plaintiffs, the Court does hereby allow said appeal, and orders that a certified copy of the record, proceedings and papers upon which said decree appealed from was based or rendered, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit; but inasmuch as the above entitled cause was by stipulation of counsel, in open court, and by order of the court made thereon, consolidated for purposes of trial and of appeal with the following named causes, to-wit:

H. A. & L. D. Holland Company vs. Northern Pacific Railway Company, numbered 1580; George Turner and Bertha Turner vs. Northern Pacific Railway Company, numbered 1581, and H. J. Shinn and Phoebe Shinn vs. Northern Pacific Railway Company, numbered 1582.

IT IS ORDERED, That the papers on appeal in all the said causes be bound up together as one record and entitled as one consolidated cause, and that the testimony taken on the trial in the said consolidated cause stand as the testimony in the appellate court in each of the said causes.

Done in open Court this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Order Allowing Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

NO. 1580.

H. A & L. D. HOLLAND COMPANY, A CORPORATION,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Defendant.

ORDER FIXING AMOUNT OF BOND ON
APPEAL.

Upon the application of plaintiff's solicitors for an order fixing the amount of a bond for costs upon its appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit, it is by the Court

ORDERED, That such bond be given and filed in the sum of Five Hundred Dollars.

Done in open court this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements. Order Fixing Amount of Bond on Appeal.

Filed Sept. 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

NO. 1581.

GEORGE TURNER AND BERTHA TURNER,
Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ORDER FIXING AMOUNT OF BOND ON
APPEAL.

Upon the application of plaintiff's solicitors for an order fixing the amount of a bond for costs upon their appeal of this cause to the United States Circuit Court

of Appeals for the Ninth Circuit, it is by the Court
ORDERED, That such bond be given and filed in
the sum of Five Hundred Dollars.

Done in open court this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Order fixing Amount of Appeal
Bond.

Filed Sept. 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

NO. 1582.

H. J. SHINN AND PHOEBE SHINN,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ORDER FIXING AMOUNT OF BOND ON
APPEAL.

Upon the application of plaintiff's solicitors for an
order fixing the amount of a bond for costs upon their
appeal of this cause to the United States Circuit Court
of Appeals for the Ninth Circuit, it is by the Court
ORDERED, That such bond be given and filed in
the sum of Five Hundred Dollars.

Done in open court this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Order fixing Amount of Appeal Bond.

Filed Sept. 26, 1913.

W. H. HARE, Clerk.
By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

NO. 1586.

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

ORDER FIXING AMOUNT OF BOND ON
APPEAL.

Upon the application of plaintiff's solicitors for an order fixing the amount of a bond for costs upon their appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit, it is by the Court ORDERED, That such bond be given and filed in the sum of Five Hundred Dollars.

Done in open court this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements. Order Fixing Amount of Bond on Appeal.

Filed Sept. 26, 1913.

W. H. HARE, Clerk.
By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

H. A. & L. D. HOLLAND COMPANY, A COR-
PORATION,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:
That the H. A. & L. D. Holland Company, a corpor-
ation, as principal, and The Title Guaranty & Surety
Company, a corporation, as surety, are held and firmly
bound unto the Northern Pacific Railway Company,
a corporation, in the sum of Five Hundred Dollars,
to be paid to the said Northern Pacific Railway
Company, for the payment of which, well and truly to
be made, we bind ourselves jointly and severally, and
each of our successors and assigns, firmly by these
presents.

Sealed with our seals and dated this 26th day of
September, 1913.

Whereas, the above named plaintiff has prosecuted
an appeal to the United States Circuit Court of
Appeals for the Ninth Circuit, to reverse a decree
rendered in the above entitled cause in the District
Court of the United States for the Eastern District
of Washington, Northern Division, on the 15 day of
July, 1913.

Now, therefore, the condition of this obligation is such that if the above named plaintiff, H. A. & L. D. Holland Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) H. A. & L. D. HOLLAND COMPANY,
Principal.

By H. A. HOLLAND,
President.

(Signed) THE TITLE GUARANTY & SURETY
COMPANY.

(Seal) By SAM'L. GALLAND,
Attorney in Fact.
THOMAS MALONEY,
Attorney in Fact.

State of Washington,
County of Spokane,—ss.

On this 26 day of September, 1913, before me, personally appeared Thomas Maloney, attorney in fact of The Title Guaranty & Surety Company, with whom I am personally acquainted, who being by me first duly sworn, stated that he is the attorney in fact of said The Title Guaranty & Surety Company, a corporation; that he knows the corporate seal of said Company; that it was affixed to the foregoing instrument by order of the Board of Directors of said Company, and that he signed said instrument as attorney in fact of said corporation by authority of said Board of Directors; and the said Thomas Maloney acknowledged said instrument to be the free act and

deed of said corporation; that said The Title Guaranty & Surety Company is doing business as a surety company in the State of Washington, and is authorized to execute this bond, and that it is worth more than double the amount of this bond in property within the State of Washington, not exempt from execution.

(Signed) J. OAKLAND,

Notary Public in and for the State, of Washington,
Residing at Spokane, Washington.

(Seal)

The foregoing bond is approved, both as to form and sufficiency of surety, this 26 day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Bond on Appeal.

Filed Sept. 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

GEORGE TURNER AND BERTHA TURNER,
Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:
That we, George Turner and Bertha Turner, as principals, and the Title Guaranty & Surety Company, a corporation, as surety, are held and firmly bound unto the

Northern Pacific Railway Company, a corporation, in the sum of Five Hundred Dollars, to be paid to the said Northern Pacific Railway Company, for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 26th day of September, 1913.

Whereas, the above named plaintiffs have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree rendered in the above entitled cause in the District Court of the United States for the Eastern District of Washington, Northern Division, on the 15th day of July, 1913.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs, George Turner and Bertha Turner, shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) GEORGE TURNER.

BERTHA TURNER.

Principals.

By Turner & Geraghty,

Their Solicitors.

(Signed) THE TITLE GUARANTY & SURETY
COMPANY.

(Seal)

SAM'L. GALLAND,

Attorney in Fact.

THOMAS MALONEY,

Attorney in Fact.

State of Washington,
County of Spokane.—ss.

On this 26th day of September, 1913, before me, personally appeared Thomas Maloney, attorney in fact of The Title Guaranty & Surety Company, with whom I am personally acquainted, who being by me first duly sworn, stated that he is the attorney in fact of said The Title Guaranty & Surety Company, a corporation; that he knows the corporate seal of said company; that it was affixed to the foregoing instrument by order of the Board of Directors of said Company, and that he signed said instrument as attorney in fact of said corporation by authority of said Board of Directors; and the said Thomas Maloney acknowledged said instrument to be the free act and deed of said corporation; that said The Title Guaranty & Surety Company is doing business as a surety company in the State of Washington, and is authorized to execute this bond, and that it is worth more than double the amount of this bond in property within the State of Washington, not exempt from execution.

(Signed) J. OAKLAND.

Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

(Seal)

The foregoing bond is approved, both as to form and sufficiency of surety, this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Bond on Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington
Northern Division.*

H. J. SHINN AND PHOEBE SHINN,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, H. J. Shinn and Phoebe Shinn, as principals, and The Title Guaranty & Surety Company, a corporation, as surety, are held and firmly bound unto the Northern Pacific Railway Company, a corporation, in the sum of Five Hundred Dollars, to be paid to the said Northern Pacific Railway Company, for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 26th day of September, 1913.

Whereas, the above named plaintiffs have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree rendered in the above entitled cause in the District Court of the United States for the Eastern District of Washington, Northern Division, on the 15th day of July, 1913.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs, H. J. Shinn and Phoebe Shinn, shall prosecute said appeal to ef-

fect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) H. J. SHINN.

PHOEBE SHINN.

Principals.

By Turner & Geraghty, Their Solicitors.

(Signed) THE TITLE GUARANTY & SURETY
COMPANY.

By SAM'L. GALLAND,

Attorney in Fact.

(Seal) THOMAS MALONEY,
Attorney in Fact.

State of Washington,
County of Spokane.—ss.

On this 26th day of September, 1913, before me, personally appeared Thomas Maloney, attorney in fact of The Title Guaranty & Surety Company, with whom I am personally acquainted, who being by me first duly sworn, stated that he is the attorney in fact of said The Title Guaranty & Surety Company, a corporation; that he knows the corporate seal of said Company; that it was affixed to the foregoing instrument by order of the Board of Directors of said Company, and that he signed said instrument as attorney in fact of said corporation by authority of said Board of Directors; and the said Thomas Maloney acknowledged said instrument to be the free act and deed of said corporation; that said The Title Guaranty & Surety Company is doing business as a surety company in the State of Washington, and is authorized to execute this bond,

and that it is worth more than double the amount of this bond in property within the State of Washington, not exempt from execution.

(Signed) J. OAKLAND.

Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

(Seal)

The foregoing bond is approved, both as to form and and sufficiency of surety, this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Bond on Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:
That we, W. H. Kiernan and Christine B. Kiernan, as principals, and The Title Guaranty & Surety Company, a corporation, as surety, are held and firmly bound unto the Northern Pacific Railway Company,

a corporation, in the sum of Five Hundred Dollars, to be paid to the said Northern Pacific Railway Company, for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 26th day of September, 1913.

Whereas, the above named plaintiffs have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree rendered in the above entitled cause in the District Court of the United States for the Eastern District of Washington, Northern Division, on the 15th day of July, 1913.

Now therefore, the condition of this obligation is such that if the above named plaintiffs, W. H. Kiernan and Christine B. Kiernan, shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) W. H. KIERNAN.

(Signed) CHRISTINE B. KIERNAN.

Principals.

By Turner & Geraghty, Their Solicitors.

(Signed) THE TITLE GUARANTY & SURETY
COMPANY.

By SAM'L. GALLAND,

Attorney in Fact.

(Seal)

THOMAS MALONEY,
Attorney in Fact.

State of Washington,
County of Spokane.—ss.

On this 26th day of September, 1913, before me, personally appeared Thomas Maloney, attorney in fact of The Title Guaranty & Surety Company, with whom I am personally acquainted, who being by me first duly sworn, stated that he is the attorney in fact of said The Title Guaranty & Surety Company, a corporation; that he knows the corporate seal of said Company; that it was affixed to the foregoing instrument by order of the Board of Directors of said Company, and that he signed said instrument as attorney in fact of said corporation by authority of said Board of Directors; and the said Thomas Maloney acknowledged said instrument to be the free act and deed of said corporation; that said The Title Guaranty & Surety Company is doing business as a surety company in the State of Washington, and is authorized to execute this bond, and that it is worth more than double the amount of this bond in property within the State of Washington, not exempt from execution.

(Seal) (Signed) J. OAKLAND,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

The foregoing bond is approved, both as to form and sufficiency of surety, this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN, Judge.
Endorsements: Bond on Appeal.

Filed September 26, 1913.

W. H. HARE, Clerk.
By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1580.

H. A. & L. D. HOLLAND COMPANY, A COR-
PORATION,

Plaintiff.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

CITATION.

(Lodged Copy)

United States of America.—ss.

The President of the United States, to the North-
ern Pacific Railway Company, a corporation, and to
Mr. E. J. Cannon, and Messrs. Graves, Kizer &
Graves, its solicitors, GREETING:

You are hereby cited and admonished to be and ap-
pear at a session of the United States Circuit Court
of Appeals for the Ninth Circuit, to be held at the
city of San Francisco, California, within thirty days
from the date hereof, pursuant to the order allowing
an appeal filed in the office of the Clerk of the Dis-
trict Court of the United States in and for the East-
ern District of Washington, Northern Division, where-
in the H. A. & L. D. Holland Company, a corporation,
is plaintiff and appellant, and the Northern Pacific
Railway Company, a corporation, is defendant and ap-
pellee, to show cause, if any there be, why the decree
rendered against the said plaintiff and appellant should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 26th day of September, A. D. 1913, and of the independence of the United States the one hundred and thirty-seventh.

(Signed) FRANK H. RUDKIN,
United States District Judge.

Attest: (Signed) W. H. HARE, Clerk.
(Seal) By Frank C. Nash, Deputy.

Due and personal service of the above Citation made and admitted, and receipt of a copy thereof, acknowledged this 26th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Northern Pacific Railway Company.

Endorsements: Citation (Lodged Copy).

Filed September 26, 1913.

W. H. HARE, Clerk.
By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1581.

GEORGE TURNER AND BERTHA TURNER,
Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,
Defendant.

CITATION.

(Lodged Copy)

United States of America.—ss.

The President of the United States, to the Northern Pacific Railway Company, a corporation, and to Mr. E. J. Cannon, and Messrs. Graves, Kizer & Graves, its solicitors, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, California, within thirty days from the date hereof, pursuant to the order allowing an appeal filed in the office of the Clerk of the District Court of the United States in and for the Eastern District of Washington, Northern Division, wherein George Turner and Bertha Turner, are plaintiffs and appellants, and the Northern Pacific Railway Company, a corporation, is defendant and appellee, to show cause, if any there be, why the decree rendered against the said plaintiffs and appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 26th day of September, A. D. 1913, and of the independence of the United States the one hundred and thirty-seventh.

(Signed) FRANK H. RUDKIN,

United States District Judge.

Attest: (Signed) W. H. HARE, Clerk.

(Seal) By Frank C. Nash, Deputy.

Due and personal service of the above Citation made and admitted, and receipt of a copy thereof, acknowledged this 26th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Northern Pacific Railway Company.

Endorsements: Citation (Lodged Copy).

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1582.

H. J. SHINN AND PHOEBE SHINN,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

CITATION.

(Lodged Copy)

United States of America.—ss.

The President of the United States, to the Northern Pacific Railway Company, a corporation, and to Mr. E. J. Cannon, and Messrs. Graves, Kizer & Graves, its solicitors, GREETINGS:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of

San Francisco, California, within thirty days from the date hereof, pursuant to the order allowing an appeal filed in the office of the Clerk of the District Court of the United States in and for the Eastern District of Washington, Northern Division, wherein H. J. Shinn and Phoebe Shinn, are plaintiffs and appellants, and the Northern Pacific Railway Company, a corporation, is defendant and appellee, to show cause, if any there be, why the decree rendered against the said plaintiffs and appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 26th day of September, A. D. 1913, and of the independence of the United States the one hundred and thirty-seventh.

(Signed) FRANK H. RUDKIN,
United States District Judge.

Attest: (Signed) W. H. HARE, Clerk.
(Seal) By Frank C. Nash, Deputy.

Due and personal service of the above Citation made and admitted, and receipt of a copy thereof, acknowledged this 26th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Northern Pacific Railway Company.

Endorsements: Citation (Lodged Copy).

Filed September 26, 1913.

W. H. HARE, Clerk.
By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1586.

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

CITATION.

(Lodged Copy)

United States of America.—ss.

The President of the United States, to the Northern Pacific Railway Company, a corporation, and to Mr. E. J. Cannon, and Messrs. Graves, Kizer & Graves, its solicitors, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, California, within thirty days from the date hereof, pursuant to the order allowing an appeal filed in the office of the Clerk of the District Court of the United States in and for the Eastern District of Washington, Northern Division, wherein W. H. Kiernan and Christine B. Kiernan, are plaintiffs and appellants, and the Northern Pacific Railway Company, a corporation, is defendant and appellee, to show cause, if any there be, why the decree rendered against the said plaintiffs and appellants should not be

corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 26th day of September, A. D. 1913, and of the independence of the United States the one hundred and thirty-seventh.

(Signed) FRANK H. RUDKIN,
United States District Judge.

Attest: (Signed) W. H. HARE, Clerk.

(Seal) By Frank C. Nash, Deputy.

Due and personal service of the above Citation made and admitted, and receipt of a copy thereof, acknowledged this 26th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Northern Pacific Railway Company.

Endorsements: Citation (Lodged Copy).

Filed September 26, 1913.

W. H. HARE, Clerk.
By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1580.

H. A. & L. D. HOLLAND COMPANY, A COR-
PORATION, *Plaintiff.*

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION, *Defendant.*

PRAECIPE.

TO THE CLERK OF SAID COURT:

You will please certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, the following records, proceedings and papers in the above entitled cause:

Bill of Complaint, Answer and Decree; abstract and condensation of testimony; Exhibits introduced upon the trial, being Nos. 1 to 55, both numbers inclusive, and all papers and proceedings on appeal.

(Signed) TURNER & GERAGHTY.

(Signed) POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

Service of the within Praecipe, by receipt of a true copy thereof, admitted this 25th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Defendant.

Endorsements: Praecipe.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1581.

GEORGE TURNER AND BERTHA TURNER,
Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,
Defendant.

PRAECIPE.

TO THE CLERK OF SAID COURT:

You will please certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, the following records, proceedings and papers in the above entitled cause:

Bill of Complaint, Answer and Decree; abstract and condensation of testimony; Exhibits introduced upon the trial, being Nos. 1 to 55, both numbers inclusive, and all papers and proceedings on appeal.

(Signed) TURNER & GERAGHTY.

(Signed) POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

Service of the within Praecipe, by receipt of a true copy thereof, admitted this 25th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Solicitors for Defendant.

Endorsements: Praecipe.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1582.

H. J. SHINN AND PHOEBE SHINN,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

PRAECIPE.

TO THE CLERK OF SAID COURT:

You will please certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, the following records, proceedings and papers in the above entitled cause:

Bill of Complaint, Answer and Decree; abstract and condensation of testimony; Exhibits introduced upon the trial, being Nos. 1 to 55, both numbers inclusive, and all papers and proceedings on appeal.

(Signed) TURNER & GERAGHTY.

(Signed) POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

Service of the within Praecipe, by receipt of a true copy thereof, admitted this 25th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Attorneys for Defendant.

Endorsements: Praecipe.

Filed September 26, 1913.

W. H. HARE, Clerk

By F. C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

NO. 1586.

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

PRAECIPE.

TO THE CLERK OF SAID COURT:

You will please certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, the following records, proceedings and papers in the above entitled cause:

Bill of Complaint, Answer and Decree; abstract and condensation of testimony; Exhibits introduced upon the trial, being Nos. 1 to 55, both numbers inclusive, and all papers and proceedings on appeal.

(Signed) TURNER & GERAGHTY.

(Signed) POST, AVERY & HIGGINS.

Solicitors for Plaintiffs.

Service of the within Praecipe, by receipt of a true copy thereof, admitted this 25th day of September, 1913.

(Signed) GRAVES, KIZER & GRAVES.

(Signed) EDWARD J. CANNON.

Attorneys for Defendant.

Endorsements: Praecipe.

Filed September 26, 1913.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

IN THE DISTRICT COURT OF THE UNITED
STATES, EASTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION.

NO. 1580.

H. A. & L. D. HOLLAND COMPANY, A COR-
PORATION,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

NO. 1581.

GEORGE TURNER AND BERTHA TURNER,
HUSBAND AND WIFE,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

NO. 1582.

H. J. SHINN AND PHOEBE SHINN, HUSBAND
AND WIFE,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

NO. 1586.

W. H. KIERNAN AND CHRISTINE B. KIER-
NAN, HUSBAND AND WIFE,

Plaintiffs.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A
CORPORATION,

Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT OF
THE RECORD.

United States of America,
Eastern District of Washington,—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from Number 1 to Number 427, inclusive, to be a full, true, correct and complete copy of the record, papers and all proceedings had in the above consolidated cases, and all the exhibits attached to the pleadings on file in said causes, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitute the record on appeals from the orders, judgments and decrees of the District Court of the United States for the Eastern District of Washington, Northern Division, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original citations issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$399.25, and that the same has been paid to me by Messrs. Turner & Geraghty, Solicitors for Complainants and Appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said district, this 20th day of October, 1913, and the Independence of the United States of America the One Hundred and Thirty-eighth.

(Signed) W. H. HARE, Clerk.

(SEAL)

IN THE
United States Circuit Court of Appeals
FOR THE
Ninth Circuit

H. A. & L. D. HOLLAND COMPANY, a
corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Defendant.

GEORGE TURNER and BERTHA TURNER,
husband and wife,

Appellants,

vs.

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Defendant.

H. J. SHINN and PHOEBE SHINN, husband
and wife,

Appellants,

vs.

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Defendant.

W. H. KIERNAN and CHRISTINE B.
KIERNAN, husband and wife,

Appellants,

vs.

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Defendant.

No. 2003

BRIEF OF APPELLANTS.

*Upon Appeals from the United States District Court
for the Eastern District of Washington,
Northern Division.*

TURNER & GERAGHTY,
POST, AVERY & HIGGINS,
Solicitors for Appellants.

FILED

DEC 18 1913



IN THE
United States Circuit Court of Appeals

FOR THE
Ninth Circuit

H. A. & L. D. HOLLAND COMPANY, a
corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Defendant.

GEORGE TURNER and BERTHA TURNER,
husband and wife,

Appellants,

vs.

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Defendant.

H. J. SHINN and PHOEBE SHINN, husband
and wife,

Appellants,

vs.

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Defendant.

W. H. KIERNAN and CHRISTINE B.
KIERNAN, husband and wife,

Appellants,

vs.

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Defendant.

No.

BRIEF OF APPELLANTS.

*Upon Appeals from the United States District Court
for the Eastern District of Washington,
Northern Division.*

STATEMENT OF THE CASE.

The above cases, being identical in the facts put
in issue and the legal propositions involved, were

consolidated in the court below for purposes of trial. The practice on appeal in consolidated cases is left somewhat uncertain by the decisions of the Supreme Court and of this Court. A single appeal which treats the consolidated cases as one case for purposes of appeal, has been condemned, although the appeal in that form was sustained in the particular cases before the courts, by virtue of the principle of estoppel. In this posture of the law appellants thought it the best practice, or at least the safest practice, to prosecute an appeal in each case and to secure from the lower court in the order allowing the appeal, a direction that the papers on appeal in each of the cases be bound up together as one record, and that the testimony taken on the trial in the consolidated cases stand as the testimony in each case in the appellate court.

Upon the question of the form of the appeal, and the form in which the evidence should be sent up, the parties entered into two stipulations. The first was in open court at the commencement of the trial, and was as follows:

“It is stipulated that all four of the above entitled cases shall be consolidated for the purposes of trial and of appeal, in case an appeal be taken by either side, each case, however, to be considered on its own merits, and the testimony offered to be applied to each case as the court may find it to be relevant, and a separate decree to be entered in each case as the equities of the case may require.”

“It is further stipulated that in case of an appeal by either of the parties, plaintiff or de-

fendant, that originals of all exhibits offered in evidence by either party shall be sent up instead of copies, and that such exhibits need not be printed as a part of the printed record."

(Record, pp. 218-219.)

The second stipulation was in writing and entered into at the time of the settlement of the evidence by the lower court, and was as follows:

"It is stipulated that the above and foregoing is an accurate condensation of the evidence taken in the above named consolidated cases, and together with the original exhibits, constitutes all the evidence taken in the said cases, and that the same may be approved by Court or Judge thereof; also that the said condensation, together with the originals of the exhibits, the pleadings in the cases, orders, judgments and decrees, and the several papers evidencing the steps taken to perfect an appeal, shall constitute the record on appeal in the several consolidated cases."

(Record, pp. 353-354.)

These cases grow out of the following state of facts:

On January 20, 1881, the Northern Pacific Railroad Company laid off and established on the north half of Section 19, Township 25 North, Range 43 E. W. M., being a section of land which came to it by the grant in aid carried by Section 3 of the Act of Congress of July 2, 1864, a townsite called Railroad Addition to Spokane Falls, and filed on said date and recorded in the Auditor's office of Spokane County, a map or plat of said townsite. On the map or plat a street called "Railroad Street," 225.7 feet wide, was delineated, with a single line of railway

track near the center of the street, two short switch tracks on each side of the main track, and a small depot building fronting the main track and enclosed within the two switch tracks. A copy of that plat, with all the writings thereon, and with the lots belonging to complainants, shaded in red, will be found at the end of this brief and enclosed within its covers.

The town was laid off and the plat filed in January, 1881. It was not until the fall of that year that the Railroad Company built its line into Spokane and over Section 19, although on the 4th day of October, 1880, it had filed its map of definite location in the General Land Office, showing its line extending over and through the north half of that section.

Immediately after the filing of the town plat the Railroad Company commenced the sale of lots in Railroad Addition, including the lots on each side of Railroad Street, conveying the same by deeds which described the lots by reference to the town plat, many of the lots abutting on Railroad Street being immediately built on with houses and business buildings fronting on Railroad Street. This course of conduct continued from January, 1881, until the fall of 1889, by which time nearly all the lots abutting on Railroad Street had been sold to the public and many of them had been built on. At the time of the great fire in 1889, the street, throughout its entire course, had been built on continuously, but not solidly, from end to end, but the street was more fully built on on the

north side than on the south side. On the north side two or more blocks were built up solidly with buildings facing Railroad Street. The buildings on the other blocks were scattering, but there was not a single block bounded by Railroad Street but had one or more buildings facing that street. This building up and establishing of Railroad Street, did not take place all at once, but it was a continuing process covering the period from January 20, 1881, to August 4, 1889. The Railroad Company not only sold the lots, fronting on Railroad Street, knowing they were to be built on with Railroad Street frontages, continuing that course of conduct for nine years, but during all that time it permitted Railroad Street to be used by the public as a street without protest, objection or interruption of any kind. At the time of the fire in 1889, Railroad Street was one of four or five principal streets of the town.

The agents of the Railroad Company in selling or attempting to sell the lots on Railroad Street, called attention to its great width and to the advantages accruing to lots abutting on it.

The fire of 1889 destroyed the buildings on Railroad Street along with those on all the blocks constituting the business part of the town, and for several years thereafter the town, now grown to a considerable city, was in a fever of activity in the process of rebuilding. The great mass of building material coming into the city, was unloaded by the Railroad Company on Railroad Street and kept there until

needed, the Company extended its depot buildings, closing some of the cross streets, and in a general way, and without much if any protest, obstructed Railroad Street and impeded it for travel.

At the end of this period, when order had begun to emerge from chaos, the Railroad Company conceived the idea of making Railroad Street a warehouse district. The lots on the south side of the street were first built up with warehouses, but none of these encroached on the street. One very small and insignificant wooden building was almost immediately placed in Railroad Street on the north side, in front of one of the lots on that side abutting Railroad Street, and there remained without protest from anybody so far as the evidence discloses. When the lots on the south side had all been occupied, and this condition was not reached for several years, the Railroad Company began leasing sites for warehouses on the north side of the street and within the limits of Railroad Street, leaving a sixteen foot alley between these warehouse sites and the north line of the street. These have been built on from time to time by the lessees, most of the building having been done within the last six to ten years, until at the time of the filing of the bills in this case, a large portion of the north side of Railroad Street was occupied with warehouses of various kinds extending from the north side of the street toward the center for from eighty to one hundred feet. There was left, however, an open space approximately 125 feet wide extending from these warehouses to the south line of the street, which has

never been obstructed except by railway tracks, and this open space had been travelled by the public, more or less, up to the time of the filing of the bills.

A few years ago, the defendant, which had succeeded to the rights of the old Railroad Company, conceived the further project of raising its tracks on Railroad Street by means of a dirt fill in Railroad Street, which would occupy practically all the open space left in that street by the then existing encroachments. This fill was designed, not only for the main track, but for switch tracks by means of which the warehouses on each side could be served through the second story. There was much contention as to why this was desired by the defendant, complainants insisting that it was for the purpose of improving the grade of the railway, and to enable the defendant to serve all the transcontinental lines in Spokane by transporting their heavy traffic over an easy grade through the heart of Spokane, and the defendant insisting that its only purpose was to separate its grade from that of the cross streets and thus safeguard life and property. It does not much matter which position was the correct one, and we leave that matter to the consideration of the Court on the evidence, if it shall see fit to look into it, still insisting that our position is the correct one. But whatever its motive, the defendant sought an ordinance from the city in 1908, requiring it to elevate its tracks on Railroad Street, and was then defeated of its purpose. It sought the same thing in 1912, and after much discussion, secured action by the City Council in line

with its wishes, the ordinance being mandatory in its command, but giving the defendant 45 days in which to accept the same, in default of which it was to be void.

Meantime the lots abutting Railroad Street, both on its north and south side, have been improved with valuable business buildings, costing many millions of dollars, all of which will be much injured and damaged by the closing of Railroad Street, and the operation thereon of heavy freight and passenger trains and switch trains at an elevation.

We do not stop at this point to refer to the record in support of the above statement of facts. Such facts therein as are controverted, and the only controverted facts, practically, are those relating to the establishment and maintenance of Railroad Street as a street, are discussed in the body of the brief with the necessary references.

The complainants, owners of property abutting on Railroad Street, alleged the above facts in substance in their bills, taking the position that Railroad Street was a street by both statutory and common law dedication, and prayed an injunction against the obstruction of the street by the structure which the defendant was then proceeding to build in the street pursuant to the ordinance passed by the City Council.

The answers set up that Railroad Street, as shown on the plat of Railroad Addition, occupied a

part of the right of way of the Railroad Company acquired by it under the second section of the Act of Congress, approved July 2, 1864, incorporating the said Company, and alleged that the Railroad Company was wholly without power to dedicate its right of way or any part thereof as a public street. They also alleged that Railroad Street as shown on the town plat, was and is by the said plat and the dedicatory and explanatory writing thereon, excepted from dedication as a street in whole or in part. They also denied that the Railroad Company threw Railroad Street open to the public use as a street, or that it was used as a street by the public with the knowledge and consent of the Railroad Company, and alleged that such use as was made of the street by the public was permissive only on the part of the Railroad Company. The answers alleged that in the proposed elevation of its tracks through the city of Spokane by means of the structure described in the complaint, it was acting in part under the duress and compulsion of an ordinance of the city of Spokane, requiring it to elevate its tracks through the city, and that it was also acting in the exercise of its inherent right and power to make such changes on its right of way as might be necessary for the proper operation of its railroad system. The ordinance referred to is set out as an exhibit to the answers. The answers also averred that the city of Spokane was a necessary party to the action.

SPECIFICATION OF ERRORS.

The appellants specify the following particulars in which they believe and aver that the court erred in rendering the decree in the said consolidated causes:

I.

In decreeing that the prayer of complainants' bills for a perpetual injunction be denied, and in dismissing the said bills and entering final decrees for the defendant.

II.

In not making, rendering and entering decrees in favor of complainants and against the defendant perpetually restraining and enjoining the defendants from committing the acts complained of in the bills and established by the pleadings and evidence.

III.

In finding and holding that Railroad Street, as described in the bills, was laid off and established on the right of way of the defendant company, acquired by its predecessor under section 2 of the Act of Congress of July 2, 1864.

IV.

In finding and holding that the Northern Pacific Railroad Company was without power to dedicate Railroad Street to the public as a street, because the same constituted a part of its right of way acquired

by it under section 2 of the Act of Congress of July 2, 1864.

V.

In finding and holding that the said Northern Pacific Railroad Company did not, in and by the town plat, filed and recorded by it, make a statutory dedication of Railroad Street.

VI.

In finding and holding that the said Northern Pacific Railroad Company did not, in and by its conduct, make and effectuate, a common law dedication of Railroad Street to the use of the public.

Stated shortly and concisely the questions presented by the pleadings and the evidence are as follows:

First: Was Railroad Street, in fact carved out of the right of way of the Railroad Company?

Second: Did the Railroad Company have power to dedicate a part of its right of way as a public street?

This is largely a question of law, although it is influenced to some extent, we submit, by the situation as it presented itself at the time the town plat was made and filed.

Third: Did the Railroad Company, in and by the town plat filed by it, in fact and in law, make a statutory dedication of Railroad Street?

Fourth: Did the conduct of the Railroad Company and the public, in the use of the street for a period of nine years, effectuate a common law dedication of that street to the use of the public?

Fifth: Did the ordinance of the city of Spokane, pleaded by defendant, justify the use and occupation of Railroad Street, by the defendant, if that street was in fact a public street?

This question was not pressed by defendant at the trial, the Court saying in its opinion:

"If it is a public street it is conceded that the municipality could not give it over to the exclusive use and occupation of the Railway Company, and such would be the necessary effect of elevating the tracks according to the plan outlined."

State ex rel Schade Brewing Co. vs. Superior Court, 62 Wash. 96.

Sixth: Is there legal force in the contention that the city of Spokane is an essential party to the litigation?

This contention, while not abandoned below, was not urged by the defendant, and it was not noticed in the opinion of the Court.

Complainants feel called on, however, to present their views on the two last questions, inasmuch as they are presented by the pleadings, and the trial in this Court is *de novo*. The defendant may or may not urge them here.

ARGUMENT.

First: Was Railroad Street, in fact, carved out of the right of way of the Railroad Company?

Complainants insist that the right of way was carved out of the street, instead of the street being carved out of the right of way. It is true that the Railroad Company filed its map of definite location on the 4th day of October, 1880, and that that map showed the line of railway to extend through the half section of land upon which Railroad Addition was platted, while the map of Railroad Addition was not filed and recorded for three months thereafter, to-wit: January 20, 1881. But the map of definite location, so far as it fixes the actual location of the track on the ground, is only approximate. The Company may change the location of its track from that laid down on the map of definite location and no one but the government can complain.

Northern Pacific R. R. Co. vs. Smith, 171 U. S. 268.

It may build its line without any map of definite location, and the right of way becomes vested as fully as if a map had been filed.

Stuart vs. Union P. R. Co., advance sheets, Opinions Supreme Court of U. S. (Oct. term 1912), April 1, 1913.

It is only the actual final survey, followed by actual occupancy for purposes of construction, that gives the right of way precision, and causes it to

relate back. Prior to that time it is only a present beneficial easement, having no precision.

Railway Company vs. Alling, 99 U. S. 475.

In respect to precision, the grant in aid of the building of the road, stands on a very different footing. That attains precision at the moment of the filing the map of definite location.

St. Paul & Pacific R. Co. vs. Northern Pacific R. Co., 139 U. S. 1.

Van Wyck vs. Knevals, 106 U. S. 360.

Kansas Pacific Railway Co. vs. Dunmeyer, 113 U. S. 629.

There can be found nowhere in any of the numerous acts of congress granting rights of way to railways any statutory criterion to determine when the grant of the right of way acquires precision. The reference in those acts to the filing of the map of definite location is wholly and entirely for the purpose of fixing the time when the grant in aid shall take effect. In the case of *Jamestown and Northern R. Co. v. Jones*, 177 U. S. 125, where the Court held that the title of the Railway Company to its right of way became perfect on the building of its road without the filing of any map of location, Mr. Justice McKenna said:

“This conclusion does not conflict with the doctrine announced in *Van Wyck v. Knevals*, 106 U. S. 360, and in *Kansas Pacific Railway Company v. Dunmeyer*, 113 U. S. 629, that the title to lands passing under railroad land grants is established at the date of the filing of the map of definite location. The same question is not presented here. Different considerations apply to land grants than to the grant of the right of way.”

It appears then that the Railroad Company, at the time it made and filed the plat of Railroad Addition, had full fee simple title to Section 19, Township 25 North, Range 43 East, of the Willamette Meridian, under the grant in aid, while its right of way was still a float, still a mere beneficial easement without precision. The full fee had vested under the grant in aid before there was any opportunity for the base fee of the right of way to attach.

Now in this posture of the law, what basis is there for the contention that the title of the Railroad Company to the land embraced in Railroad Street, must be referred to the grant of the right of way contained in the second section of the Act of Congress of July 2, 1864, rather than to the grant of the odd sections in aid of the road, contained in section 3 of that act?

It is true that the right of way grant, imperfect as it was, was yet not subject to any exception, while the grant in aid was subject to the exception that it attached only to lands "not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims of right, at the time the line of said road is definitely fixed," but that difference shows no purpose on the part of congress to attach any peculiar force or effect to the right of way grant over the grant in aid, when the latter grant had met all the exceptions mentioned, and became fixed by the filing of the map of definite location. To be a little more explicit: Both grants were in *praesenti*; the right of

way grant, although a float until the road was definitely located, yet took effect from the date of the granting act as burdening every section of the public domain over which it might by any possibility be located between the two terminal points,—that is to say: After the date of the Act, no subsequent disposition of the public lands could relieve them of the burden of the grant; the aid grant, on the other hand, was subject to any disposition the government might make of the public lands covered by it up to the time of the filing of the map of definite location, but it became fixed and certain and beyond recall when that map was filed, as to all lands covered by it and not then disposed of. As to all such lands title took effect, by relation, from the date of the granting act. As to all such lands, such title as was conveyed by either of the grants, took effect as of the date of the granting act, and were equal in that respect. The most that can be said of either grant, and what may be said of one as well as the other, is that it took effect as of the date of the granting act. So that the fact that the grant in aid carried an exception of lands disposed of before the filing of the map of definite location, cannot be considered in derogation of the aid grant as to lands coming to the company under that grant and freed from the exception. And this is especially true, where the title under the grant in aid was designed to become a full and perfect fee, subject only to a condition subsequent, on the filing of the map of definite location, while the grant of the right of way would then still be a float, requiring

something more to give it precision, and when it had attained precision, title under it would still be a lesser title than that conveyed by the grant in aid. While it has been said, and with truth, that these grants to railway companies are something more than mere conveyances, and are therefore not to be thwarted of their purpose by a strict application of the learning applied to conveyances, there must be some evident policy in them to which that learning would run counter, in order to justify its displacement in their construction. Nothing of the kind can be found in the Act of July 2, 1864.

The learned Court below was in error in holding that "the grant of the right of way was an entirety and is held throughout by the same tenure and subject to the same limitations." Congress knew that its grant would not give the Railroad Company a continuous right of way, because it provided in Section 7 of the granting act for the condemnation of private property for right of way (13 Statutes, p. 369), which negatives any purpose that the Railroad Company should take a grant from the government of a right of way as an entirety, and hold it throughout by the same tenure and subject to the same limitations. In pursuance of this power of condemnation, it is to be noted, the right of way may be of any width necessary for the purposes of the Company not exceeding 400 feet. What becomes of the continuity of the 400 foot right granted by congress when the Company condemns a right of way through private property of 50 feet or of 100 feet? What also be-

comes of the identity of tenure and of limitations spoken of by the Court below, as to parts of the right of way acquired by condemnation? Manifestly those parts of the right of way are free from the reverter declared in *N. P. Ry. Co. v. Townsend*, 190 U. S. 267.

The Supreme Court of the United States, in the last named case, was considering the right of the Railroad Company in an even section, where the only basis of railroad title was the grant of the right of way conferred by section 2 of the granting act. It could not have declared the title to have been "a limited fee, made on an implied condition of reverter," if it had been dealing with an odd section, where both the right of way grant and the aid grant, concurred in conferring title. In such a case, on abandonment of the right of way, the full fee conveyed by the grant in aid, would intervene to prevent reverter. Since, then, it was within the contemplation of congress that the continuity of the right of way, held under the congressional grant, might be broken, in cases of condemnation, why not that it might be broken when the Railroad Company built over its own lands? In neither case could there be any reverter on failure of the condition annexed to the right of way grant, and it was the implied condition of reverter that influenced the decision in the *Townsend* case.

Suppose the Railroad Company after the filing of its map of definite location had constructed its

road, as it might have done, on the south half of Section 19 instead of on the north half, can there be any doubt that its dedication of every street in Railroad Addition, laid out on the north half would be held valid and free from question? The affirmative answer to this question necessarily carries with it the proposition that as to Section 19 the Railroad Company took title to every square foot of it by virtue of the grant in aid and not by virtue of the right of way grant. If the filing of the map of definite location showing the line through the north half of that section did not fix that line there, but did fix it for the purpose of the land grant, then, at the time the Railroad Company made and recorded its townsite, it had full fee simple title to every part of Section 19, unburdened by any condition except a condition subsequent, and might lawfully devote every foot of it to any public purpose it pleased, and its dedication of Railroad Street was valid, and the reservation of a right of way over the street was a carving of that right out of the street instead of a carving of the street out of the right of way.

This conclusion is enforced by a consideration of the nature of the two grants and of the rules of law applicable to them. The grant of the right of way vests a lesser estate in the land than the grant in aid. The former was the grant of "a limited fee on an implied condition of reverter."

N. P. Ry. Co. v. Townsend, 190 U. S. 271.

A limited fee is a base fee.

Cooley's Blackstone, Book 2, p. 109.

An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out of ~~time~~. *him*.

Cooley's Blackstone, Book 2, p. 173, Marg. p. 175.

If then the Railroad Company took title to that part of section 19 embraced in Railroad Street under both grants, even if both attained precision by the same act, namely, the filing of the map of definite location, the lesser title merged in the greater.

Cooley's Blackstone, Book 2, p. 177.

Cyclopedia of Law and Procedure, Vol. 16, p. 665.

Black v. Elkhorn Mining Co., 49 Federal Rep. 553.

Under the doctrine of merger the greater title, relating back to the same point of time as the lesser, must have prevailed from the beginning.

Where A grants to B a right of way over a certain tract of land belonging to A, and by the same instrument conveys to B a part of the same tract in fee simple, and B, when he locates his right of way, over said tract, locates it in part over the land conveyed to him in fee, can there be any doubt that the right of way title over the land of B is merged in the fee simple title, and that B may discontinue the right of way entirely if he pleases or burden it in any way he may see fit?

This doctrine of merger would come in conflict

with the principle that these grants must be construed in a manner to effectuate the intention of congress, if any evidence could be found of an intention to require a continuous right of way to be held subject to the reverter declared in the Townsend case. But we have seen that the provisions of the act of 1864 negatives any such intention, and shows that, outside the even sections of the public domain, as to which a grant of the right of way was necessary, congress intended the Railroad Company to acquire a right of way of such dimensions as it pleased, and to be held by it, absolutely free from condition or limitation in favor of the United States.

There has been a disposition on the part of some of the courts in the past to apply legal principles with the utmost rigor in order to protect railway corporations from the just consequences of their own acts. Of that we do not specially complain. But when the application of plain legal principles will hold them to such consequences, we respectfully submit that fanciful considerations of public policy, which have no real foundation in the essence of things, or in any declared public purpose, ought not to be permitted to defeat a result so just and meritorious.

SECOND.

But if the Railroad Company took title under the right of way grant, did it have power to dedicate a part of its right of way as a public street?

This question we insist must be answered in the affirmative.

The identical dedication involved in this case has been held valid as to cross streets.

N. P. Ry. Co. v. City of Spokane, 56 Federal Rep. 916.

N. P. Ry. Co. v. City of Spokane (C. C. A.), 64 Federal 506.

The same thing has been held by the Supreme Court of the United States, and an intimation given broad enough to include longitudinal streets,—

N. P. Ry. Co. v. Townsend, 190 U. S. 267.

N. P. Ry. Co. v. Ely, 197 U. S. p. 1.

The doctrine of the Townsend case has been construed to authorize the condemnation of a longitudinal right of way for another railroad out of the right of way of the Northern Pacific right of way,—

North Coast R. Co. v. N. P. Ry. Co., 48 Wash. 529.

Also to authorize the application of the doctrine of estoppel against the Union Pacific Railway Company, claiming that a street, and other lines of railway than its own on the street, were illegally on its right of way,—

U. P. Ry. Co. v. City of Greeley, 189 Federal 12-13.

If the right to condemn a longitudinal right of way for another railroad out of the Northern Pacific right of way exists, certainly the right to condemn a longitudinal street out of the same right of way must

exist. A street is as important a public purpose as a railroad right of way, and the power of eminent domain must exist as well for the one purpose as for the other. And if the right of way can be condemned for the purpose of a street, against the will of the Railroad Company, the Company, of its own free will, can devote its right of way to that purpose. The power of condemnation, however, is not the measure of the power of dedication. The act of dedication is a conclusive declaration by the Railroad Company that the lands dedicated are not necessary for railroad purposes, except to the extent of the use reserved, something that a court might not feel justified in finding over the opposition of the Railroad Company. It may be said that whenever there is the right of condemnation, there is also the right of dedication, but it cannot be said that absence of the right to condemn also shows absence of the power to dedicate.

And if, as held in *U. P. Ry. Co. v. City of Greeley, supra*, a railroad company owning a right of way by congressional grant, similar in every respect to the grant in this case, can, by indirection, lose the right to complain of a street laid off on its right of way, why not by its solemn act in writing evidencing a deliberate intention to establish the street? An estoppel by writing is certainly as efficacious as an estoppel *in pais*.

The fact that the fee of the Railroad Company

was conditional would not defeat the power of dedication,—

N. P. Ry. Co. v. City of Spokane, 64 Federal 509.

Mechem v. Seattle, 45 Wash. 387.

Elliott on Roads & Streets (3rd Ed.), Section 159.

13 *Cyc.*, p. 443-C.

Especially where the remainderman (in this case the U. S.), has consented to the establishment of streets over the public domain,—

Revised Statutes of U. S. (1878), Section 2477.

The case of *N. P. Ry. Co. v. City of Spokane*, decided by this Court and reported in the 64th Federal Reporter, at page 506, involved a consideration of the force and effect of the same townsite plat relied on by the complainants in this case, but only in so far as it involved the streets laid out across Railroad Street. The Railroad Company was then endeavoring to block those streets and put forward the absurd contention that it could not dedicate a public street across any part of its right of way. This Court had no difficulty in determining that contention against the Railroad Company. No doubt expressions employed in the decision of that case ought to be looked at in the light of the precise case before the Court. But it is difficult to discriminate, so far as necessary public uses are concerned, between a cross street and a longitudinal street. The necessities of a municipality will always ^{former; but they may often imperatively require the} require the latter. So that we respectfully submit that the decision of this Court in the case referred to is logically determinative of

this case so far as the present case involves the question of power. This Court, at the time it rendered its former decision, evidently intended to make it comprehensive, because it made no effort to guard its language so as to confine the force and effect of the decision to cross streets, but announced principles broad enough to cover public uses of every character.

Speaking of the right of way grant, it said:

"Its only limitation was the implied one that the Railroad Company might not divert the granted strip to other and foreign uses, and might not cede to the public rights and easements so extensive or of such a nature, as to interfere with its duties to regularly and properly operate a railroad."

and again:

"The nature of the right of way over the public lands which the railroad company obtained by the grant was not different from that it acquired over private lands by purchase or by condemnation proceedings, under the laws of the several states through which it passed. Whether the company acquired the fee to the lands covered by its right of way or not, no reason is apparent why it may not dedicate public easements *over* and across the same, and by its own act grant to the public all the rights which the latter might obtain by the exercise of its right of eminent domain. Of course, the railroad company could confer upon the public no greater estate than it possessed, and, in any view of the case, the dedication could not affect the reserved rights of the United States, whatever they might be. The public easement, so dedicated, is undoubtedly subservient to the exigencies of railroad use, and the public take the dedicated crossing subject to the inconveniences which may re-

sult from the increase of traffic and transportation along the line of the road, and the possible necessity of laying more tracks thereupon; but the company, after such dedication, and after rights have been acquired thereunder, may not close up the street with a building, and may not say, as in this case, that because it is convenient to have a warehouse at this point, and because there is no place within the city so desirable for that purpose, it will revoke the rights which it has conferred upon the public by the dedication. One of the objects of congress in making the grant was to upbuild and develop the country through which the road was to pass, and it is in harmony with this purpose, as well as in line with the adjudicated cases, so far as they have approached the question under consideration, to hold that such public use is not inconsistent with or subversive of the railroad use, which was intended by congress."

The case decided by this Court, was the only case, we believe, involving the public use of a railroad right of way under congressional grant, before the Supreme Court of the United States when it was considering *N. P. Ry. Co. v. Townsend*, *supra*, and it was in view of the decision of this Court in the case referred to, and the comprehensive language used in that decision, that the Supreme Court felt called on to make the broad reservation found in the following extract from its opinion:

"Of course, nothing that has been said in anyway imports that a right of way granted through the public domain within a State is not amenable to the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the

railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

The Federal cases, above referred to, clearly show that the right of way granted by the government may be devoted to public uses, and this Court has said that the only limitation was that the use must not be such as to interfere with the duty of the railroad company to regularly and properly operate a railroad.

It has also been held by the Federal Courts that a railroad company may burden its right of way, by its own contract, for private purposes, and *a fortiori*, it may burden its right of way itself, or submit to have it burdened by the public, for public purposes.

The extent to which railroad companies, including companies chartered by congress and having their right of way by congressional grant, may burden and hamper themselves in the use of their right of way, by private contract, is shown in:

Mo. Pac. Ry. Co. v. Nebraska, 164 U. S. 414.

Hartford Insurance Co. v. Chicago, etc., R. Co.,
175 U. S. 99.

Chicago, R. I. & P. Ry. Co. v. U. P. Ry. Co.,
47 Federal 16.

Union Pacific Ry. Co. v. Chicago, etc., Ry. Co.,
163 U. S. 564.

To which may be added from the state of Washington the following cases:

O. R. & N. Co. v. Owsley, 3 Wash. Ter. p. 38.
Seattle & Montana R. R. Co. v. Roeder, 30 Wash. 261.
State v. Superior Court, 46 Wash. 516.
Tacoma & Eastern R. Co. v. Smithgall, 58 Wash. 451.

The case of *Chicago, R. I. & P. Ry. Co. v. U. P. Ry. Co.*, *supra*, is an illuminating case on this point. The railroad company in that case had burdened the use of its right of way by a contract whereby it gave another railway company the right to use its tracks for 999 years. It undertook to escape that contract by saying that the contract was *ultra vires* and beyond its power, and that contention was met by Judge Brewer, as follows:

"Its obligation to the government is not to hold all its tracks or property beyond the use or touch of any other corporation. It goes no further than to retain such possession and use as will enable it to run all its trains and carry its passengers and freight. No monopoly of isolation from other currents of business is essential to this. It may do all the business which is offered, and still have a surplus use of its tracks. Can it be that its obligation to the government or the public compels it to let that surplus lie idle?"

Again:

"I think it may be laid down as a general proposition that a corporation which, in the discharge of the duties imposed on it by charter, acquires property which it must have for its own uses, may, if there be a surplus use of such property, make a contract for the disposition of such surplus use in any manner not inconsistent with the purposes of its creation."

The case was affirmed by the Supreme Court on the precise reasoning of Judge Brewer.

There is another feature of that case to be noticed. The defendant company said in aid of the plea of *ultra vires*, that it was impossible to foresee what its own demand on its tracks might be in the future of the 999 years during which the contract was to continue, to which Judge Brewer replied:

“But again, the powers of a court of equity do not end with a day. If the changed condition of affairs 20 years hence shall make the full use of its tracks and other facilities necessary to the Pacific, for the transaction of its business and the discharge of its duties to the government and to the public, the powers of a court of equity are equal to the emergency, and can relieve it from the obligation of the contract; for the obligation of a corporation to not disable itself from the discharge of its duties is a continuing one, and all contracts which it makes endure only so long as their continuance does not create such disability.”

The suggestion made by Judge Brewer is not that changed conditions *ipso facto* terminate the contract, but that changed conditions would authorize a court of equity to relieve against the contract, which action would, of course, be on condition that the party seeking relief do equity to the other contracting party. The Railway Company here, however, is not seeking to be relieved of its action, but asks the Court to declare that its action has never had any validity, and it claims the right, in its answer, to close Railroad Street and destroy it, from end to end, for all purposes, without making compensation to any person who will be injuriously affected thereby.

In this connection, we call attention to the lan-

guage of Mr. Justice Brewer, distinguishing between the doctrine of *ultra vires* as applied between corporations and their creators, and the same doctrine as applied between corporations and individuals and other corporations with whom the former has contracted:

"The question as to whether a contract is *ultra vires* or not may arise in a controversy between the state and a corporation, or between the corporation and the party with whom it has assumed to contract; and it may well be that different rules of construction apply to the two cases: All grants, even grants of corporate franchises, are construed strongly in favor of the government, and against the grantee. So when the state challenges the action of one of its corporate creations, it may insist on clear warrant for such action. It may say: 'Point to the letter of your authority. I abide by my contract, and protect you in the rights and franchises I have given. Abide by your contract, and assume to do no act in disregard of the duties I have imposed, or beyond the authority I have conferred.' The rule of strict construction exists in such a case. But a milder rule applies when a corporation seeks to repudiate a contract into which it has formally entered. It is not seemly for a corporation, any more than for an individual, to make a contract and then break it; to abide by it so long as it is advantageous, and repudiate it when it becomes onerous. The courts may well say to such corporation: 'As you have called it a contract, we will do the same. As you have enjoyed the benefits when it was beneficial, you must bear the burdens when it becomes onerous, unless it clearly appears that that which you have assumed to do is beyond your powers.'"

Now we must accept the doctrine of the Townsend case that the Railroad Company could not

alienate the fee of its right of way or any part thereof to a private individual, but apart from that, we insist again that there is only one limitation on either a public or private use which may be permitted, and that is, that the use permitted do not disable the railroad company in the performance of its public functions. This does not mean that it may not inconvenience itself in one direction for corresponding advantages in another,—that it must at all hazards retain the power and the faculty of using and employing at all times and to its fullest capacity every foot of its right of way for every purpose for which future contingencies might make it desirable to use it. On the contrary it means and must mean, that it may limit or hamper itself by a permitted use which may seem to it to be in aid of its business, provided such use does not disable it in the performance of its public duties. Moreover, since it must act on matters as they arise, and in accordance with the advantages or disadvantages as they present themselves at that time, it cannot, if its action be found disadvantageous at a later period, be permitted to repudiate its action for that reason.

These principles seem the necessary corollary of the decisions referred to. Now let us apply them to the case in hand.

In 1881, when the railroad was built through Spokane, no one foresaw the splendid future of the town. It was a paper town the same as Cheney, Sprague and Ritzville, and the Railroad Company

made its dispositions in accordance with what its interests and the supposed interests of the town then seemed to require. In all probability it would never grow beyond a mere village, or at most, into a good sized country town. The Company's interests would be best subserved, as it then saw its interest, by a wide street on each side of its track, by which its customers could approach it and by and through which it might conveniently serve them.

Why was not that, as the matter then presented itself, a wise disposition to make? At any rate, was it not a reasonable disposition for it to make? It has proven so in the other towns laid off by it at the same time, namely, Ritzville, Sprague and Cheney, and to this day those towns are each served by a street called "Railroad Street," occupying the right of way, and which is the principal street of the town. Spokane, however, has grown beyond expectations, and it is found that the convenience of the Railway Company will be better subserved by repudiating the early action of the company, and now insisting that the street dedicated as a street is not in fact a street, but that it is a railroad right of way, in which the public can have no interest. Can the Railway Company now do that? It can if the Court shall find that Railroad Street was carved out of the company's right of way and that the early action of the company went to the extent of disabling it in the performance of its public functions. But it cannot if the Court shall find that, taking into consideration the situation at the time the action was taken, it was a reasonable use

of its right of way, and one promotive of the business of the company, and for the convenience of all concerned. In that case, mere present convenience and advantage ought to cut no figure. It is no doubt a great convenience and advantage to the company to establish a warehouse district in the center of the city, and to now turn Railroad Street into a switching yard, from which to serve the warehouses of its customers, but will the denial of that right, on the ground that the company dedicated its right of way for a street, subject to its own use of the same for railway purposes, disable it in the performance of its public functions? Manifestly not. It may inconvenience it, but that is a contingency which every railway company faces when it devotes any part of its right of way to public or private uses, in aid of its general functions, and a contingency which it must put up with when such devotion of its right of way clashes with its present convenience. It cannot be of the essence of the public duties of a railway company that it establish a switching yard on some one particular part of its right of way, or that it be permitted to establish a warehouse district in the center of a large city. It can always do those things elsewhere along its line, and thereby reasonably fulfill its public duties and functions. It is, however, of the essence of its functions that it maintain its right of way so that it may continue to operate its railway over and along the same. In the language of *Hartford Insurance Company v. Chicago Railway Company*, 175 U. S. 99, it may permit its right of way to be occupied, "so long as a free and safe passage is

left for the carriage of freight and passengers.”

Aside from supposed limitations on the power to dedicate Railroad Street, found in the grant of the right of way, with which we have now dealt, there are a few state cases, some of them based on so-called public policy, and others on failure of the state to confer the power to condemn in such cases, against the condemnation of railroad rights of way for street purposes. This is mere matter of state policy. By virtue of the same policy, or because of the same failure in the condemnation laws, it is held in the same states that one railroad cannot condemn a longitudinal right of way out of the right of way of another railroad.

But as to the right to dedicate streets in rights of way, which is quite a different thing from the right to condemn, we cite,—

Elliott Roads & Streets (3rd Ed.), Sections 160 and 161 and authorities cited.

People ex rel. Field v. Eel River & E. R. Co.,
33 Pac. 728.

So. Pac. Co. v. City of Pomona, 77 Pacific 929.

We also insist that *North Coast R. Co. v. N. P. Ry. Co.*, 48 Wash. 529, establishes a state policy, even in cases of condemnation, which would authorize condemnation of a railroad right of way for a street, and that that decision is binding on this Court in this case.

THIRD.

Did the Railroad Company, in and by the town plat filed by it, in fact and in law, make a statutory dedication of Railroad Street?

The answer to this question depends on whether the dedicatory language attached to the plat constituted an exception of the soil of Railroad Street from the dedication, or whether the plat and dedicatory language together effectuated a dedication of that street with reservation of the right to use it for railway tracks and other uses.

The language employed was "the streets shown upon said plat are dedicated to be used by the public until lawfully vacated, except the strip of land 225.7 feet in width designated as Railroad Street which is reserved for the tracks and use of said Railroad Company."

This language standing alone might create either an exception or a reservation, although the only word in it having a technical meaning in the law is the word "reserved." But the words "reserved" and "excepted" are so frequently employed interchangeably that the courts, in determining their effect, look at and follow the intention of the parties. An attempted reservation is construed as an exception, and an attempted exception as a reservation, when to do so will effectuate that intention. This is elementary law, but we cite in its support:

13 *Cyclopedia of Law and Procedure*, p. 672, 3 and 4, and p. 677.

Words and Phrases Judicially Defined, Vol. 3,
p. 2542, et seq.

Byles v. Tacoma O. & G. H. R. Co., 5 Wash-
ington 509.

Bridger v. Pierson, 45 N. Y. 604.

In the case last cited the Court quotes from the decision in *French v. Carhart*, 1 Comstock, 96, as follows:

“Too much regard is not to be had to the proper and exact signification of words and sentences, so as to prevent the simple intention of the parties from taking effect. And whenever the language used is susceptible of more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into; the situation of the parties and of the subject matter of the instrument. To this extent, at least, the well settled rule is that extraneous evidence is admissible to aid in the construction of written contracts.”

Pursuing, now the course laid down by these authorities, it seems hardly necessary to do more than look at the plat alone to find conclusive evidence that the dedicator intended to create and establish Railroad Street as a public street.

Throughout the entire length of the street on the south side, none of the lots platted, except corner lots, have any means of access except by and through Railroad Street. They have no street frontage unless Railroad Street be a street. This fact was noted by this Court when the case involving the cross streets was before it, and it is a fact so significant as to be almost if not quite controlling. Is it possible that the dedicator expected to sell to the public lots hav-

ing no means of ingress or egress, and when it platted and sold lots fronting on Railroad Street, and having no other means of access, is it possible that it did not intend the public to understand that that means of access would remain open to them for all time?

The street is marked in large letters "Railroad Street." Why call it a street if it was not in fact intended to be a street? It is impossible to assume that as capable and reputable a business man as General Sprague would have called it a street if he had not intended that it should be a street, especially when the situation of the lots to the street is considered and when it would have been so easy to call it by any other appropriate name, if it was not, in fact, intended to be a street.

Lastly, the dedicator went out of its way, in the legend on the plat, to show the width of Railroad Street, there coupling it with other streets, and again calling it Railroad Street. This was unnecessary, and was further misleading the public, if the street was not intended to be a street.

The Court below said "there is no magic in the use of the word street," and the statement might be correct if the intention of the dedicator was otherwise plain and clear, but where the intention is obscure, as in this case, to take the view most favorable to the dedicator, there is great significance in the use of the word. Town lots fronting on Railroad Street, and having no other means of access, would not have been

saleable if, instead of calling the street a street, the dedicator had called it Railroad Reserve, or some other equally appropriate term to indicate that it was not in fact a street.

But there was significance in the use of the word street for another reason. The prominent features of a town plat are the lots, blocks, streets and alleys shown on it. The dedicatory language is generally in fine script off in one corner. Moreover, this language is rarely reproduced in the lithograph copies of the plat struck off for the use of the public and of agents employed to sell the lots to the public. Outside the official plat at the court house in Spokane, there was no record of the dedicatory language attached to the plat of Railroad Addition, and it is doubtful if any of the purchasers of lots in that addition ever saw or heard of any reservation or exception of Railroad Street to the uses and purposes of the Railroad Company. For these reasons, the Courts, as the cases hereinafter cited show, attach the utmost importance to the use on the face of the plat of the word "Street," "Park" or other designation, which indicates that a particular sub-division of land marked off on the plat, was intended to be dedicated to public use.

The situation of the subject matter, and the circumstances surrounding the transaction, all confirm the deductions drawn from the plat itself. Spokane was a paper town in 1881 with not to exceed two hundred and fifty people. There was no conception in

the mind of anybody of its future growth. That the use of Railroad Street for railroad purposes would ever exceed the use indicated on the plat, nobody ever thought for a moment. The Railroad Company owned the odd sections of land in and around the town, and desired to make its property attractive to purchasers so that it might sell the same and replenish its depleted coffers. It thought it might do as it pleased with the land. Its officials were not conscious that there was any limitation on the power of disposal, as evidenced by the fact that 175 feet of the so-called right of way, was platted into town lots and sold to the public.

The Railroad Company executed and acknowledged on the same day as that on which it executed and acknowledged the town plat of Railroad Addition to Spokane Falls, town plats of Cheney, Sprague and Ritzville, towns to the west of Spokane. Each of these plats had on it a wide street called Railroad Street, with the tracks of the railway in the center of the street, and the dedicatory language on each of the plats was identical with that on the plat of Railroad Addition. The evidence shows that the Railroad Street in each of those towns is maintained as a street to this day.

See Plaintiffs' Exhibits 5, 6 and 7. See also, testimony of George F. Christensen, p. 240; of John I. Melville, p. 242; of Martin J. Maloney, p. 245.

More than that,—Prior to the making of the plat, General Sprague visited Spokane and talked

with Mr. Browne, owning land to the west of Section 19, and desirous of platting the same, about plans for platting both tracts, so that the streets of each tract would join at the intersection and extend through each tract, and it was then agreed between them that the Railroad Company should lay off Railroad Street and that Browne should plat a similar street to be called by the same name as a continuation through his tract to the west. When Railroad Addition was platted, Browne, pursuant to the understanding with General Sprague, platted his addition and laid off Railroad Street through it, joining it to the Railroad Street of Railroad Addition on the east, and making it of the width of 200 feet.

(Record, pp. 290, 291 and 292.)

This fact was established in the former case before this Court, and was noticed in the opinion in that case,—

64 Federal Reporter, p. 507.

The fact was also established in *Northern Pacific Railway Co. v. Ely*, and was noticed in the opinion of the Supreme Court of the United States in that case, and in a manner to indicate that the arrangement made by General Sprague, and carried out by the dedication of Railroad Street, was unobjectionable in the view of the Court.

197 U. S. p. 1.

In view of these facts how can there be any possible question that the Railroad Company intended Railroad Street to be a street?

We now go a step further.

Where a town plat is ambiguous it must be construed, like a deed, most strongly against the dedicator, and in such cases the practical construction put upon the plat by the dedicator and the public, if in favor of the public right, is controlling.

Elliott on Roads & Streets (3rd Ed.), Section 131 and authorities cited.

Florida & East Coast R. Co. v. Worley (Florida), 38 Southern Reporter 618.

City of Alton v. Ill. Transp. Co., 12 Illinois 38.

The cases last cited sustain the propositions stated, and also show the significance attached to the plat itself as opposed to contradictory writing thereon.

Proceeding now to apply the principle last stated, complainants respectfully insist that if the case were devoid of any other feature, the practical construction put upon the plat by the Railroad Company and the public for nearly ten years, shows that it was the intention of the Railroad Company, in and by its plat, to dedicate Railroad Street as a street.

The Railroad Company immediately began to sell the lots and to convey them by reference to the plat. At the time of the great fire in 1889 all the lots on the north side of Railroad Street and most of those on the south side had been sold and so conveyed.

See Plaintiffs' Exhibit 11.

The agents of the Railroad Company in making

sales and attempting to make sales of lots on Railroad Street, called attention to that street, and remarked on the advantage of lots abutting on it.

See testimony of J. E. Gandy, Record, p. 219.

Testimony of H. J. Shinn, Record, p. 235 and 236.

Immediately after the filing of the plat, Railroad Street was thrown open to the public, business houses and residences were built fronting on the street on both sides of it, on lots sold by the Railroad Company, none having any means of ingress or egress to their front entrances except by and through Railroad Street, and those which were on the inside lots on the south side of the street, having no means of ingress and egress to any frontage at all except by and through Railroad Street, unless the 16 foot alley on which they abutted at the back can be considered a means of ingress and egress. At the time of the fire, the street upon both sides was so built upon in every block, and several blocks on the north side were built up solidly with hotels and business buildings having no frontage except Railroad Street.

During that period, to-wit, from January, 1881, until August, 1889, the space between the interior lines of the street, as shown on the plat, was used by the general public as a street as freely as any other street in the town. At the time of the fire Railroad Street was one of four or five principal streets. Never at any time was there any attempt on the part of the

Railroad Company to obstruct the use of the street or any intimation given by it that Railroad Street was not as much a street as any other street in Railroad Addition.

The testimony on the subject is really all one way. The only discrepancy between the witnesses for complainants and those for defendant, was as to the extent to which Railroad Street was used prior to the fire.

Dr. J. E. Gandy testifying on that subject said:

"It was used as the principal driveway to and from the passenger depot from the down town district, which was then on the corner,—the business district was then on lower Howard Street from Front Avenue south, a block and a half probably. It was used as much as any street in town, except possibly Howard Street and possibly Front,—that is, talking now of the early history prior to the beginning of 1883 and 1884. It continued to be a used street, much used street, up to the time of the fire, the big fire in August, '89, August 4th, 1889. That fire swept away everything on Railroad Street east of Lincoln Street. Lincoln Street was the west line of the fire. At the time of the fire Railroad Street, on the north side was nearly all occupied by buildings from Lincoln Street east and Monroe Street east until you got up to Howard Street, and some on Howard Street and Railroad. The buildings were generally wooden buildings and most of them one story. One or two of them were two story buildings. On the

south side of the track there were not so many buildings."

Record, pp. 221, 222.

"Compared with Front and Main Streets, well in the early history Front and Main were much more prominent than Railroad Street, that is from 1880 up to the next two or three years. But as time went on Front became less and less used, Railroad more and more used. Up to the time of the fire Front Street had become principally a second class street, while Railroad had improved very materially in that five or six years. There was a Hotel called the Sprague Hotel on Railroad Street, built by a man named Kinsell. It stood on the west side of Post on the first two lots, and it fronted south on Railroad Street. It was burned prior to the big fire. It and the California House were the two best houses in town. The Sprague House was a fine Hotel, and it was recognized as one of the finest hotels in the upper country."

Record, p. 223.

"Up to the time of the fire there was never any interruption of the use of Railroad Street by the Railroad Company that I remember of. Never heard of any objection. There were no obstructions of any kind in the street, except the tracks and the railroad depot. At the time of the fire Spokane had grown to be several thousand, ten thousand probably. I don't remember. There were sidewalks on Railroad Street. I remember building a sidewalk in front of my own

lot where Railroad Hotel was. I don't remember much about the sidewalks. I know I had to put down one in front of my fifty feet and I know there was sidewalks clear across that block. Don't remember much about sidewalks further east or west. There were hitching posts in front of my building opposite the depot, just on the edge of Railroad Street. The street from Monroe on the west to Washington on the east, six blocks, was used for traffic."

Record, p. 225.

On Cross Examination:

"On the south side people just drove along there promiscuously, either on the right of way or on the north tier of blocks where there were no buildings. When I talked about them traveling the street I was talking of travel north of the track. On the north side of Railroad Street the north end of the lots were rocky. The south ends were generally smooth. These lots were built on very early. People did not drive along there promiscuously, there was a well defined roadway close to the railroad track, not right close to it, it was between our building and the track. I am referring now to all the blocks west of 12, west of 12 as far as Madison or Jefferson. There was a well defined roadway from Howard Street west to the depot. It came up to the extreme end of the lots. The driveway wasn't so well defined after you got west of the depot."

Record, p. 229.

We have quoted Dr. Gandy's testimony at some

length, because when the next succeeding witness was beginning to testify about the same matters, the Court, with a view no doubt of abridging the testimony as much as possible, asked counsel for defendant the question: "To what extent does the defendant dispute the testimony of J. E. Gandy," to which Mr. Graves replied: "I haven't any reasonable doubt that Dr. Gandy has told things approximately as they were. He has got his dates a little confused. Of course we will show that the tracks were increased. We will show by subsequent maps the increase of tracks. But I have no doubt there was a kind of general travel the way he states."

The same facts testified to by Dr. Gandy, but of course with some variation and with additional incidents, were testified to by H. J. Shinn, Record, pp. 232 to 236; Lucius G. Nash, pp. 247 to 249; Frank Johnson, p. 250; W. S. Norman, pp. 254 to 258; M. S. Bentley, p. 262; Rufus Merriam, pp. 265 to 266; D. M. Drumheller, pp. 269 to 270; J. B. Blalock, pp. 271 to 272; Thomas Thwaite, pp. 273 to 274; George Turner, pp. 274 to 279; C. J. Craig, p. 286; H. A. Holland, pp. 287 to 288.

H. J. SHINN:

"I have driven over this street a great number of times; it was universally used by the public. I never heard of any obstruction to public use prior to the fire; never heard of any objection by the Railroad Company prior to the fire; never saw any signs or warnings against its use. * * * The travel was

straight up and down Railroad Street on either side of the track. The principal travel was between Howard and Lincoln, which were the only streets graded. * * * They generally followed the line of the railroad. They might be on the street line of the lots or might be on the street line of Railroad Street, but they were never liable to be off the right of way because that was graded. I wouldn't call it graded, but it was smoothed off so that you could drive along."

LUCIUS G. NASH:

"I am familiar with Railroad Street as laid out on the plat of Railroad Addition. That street was constantly used from 1881 to the time of the great fire in 1889. It was used by the public as a thoroughfare. I never heard of any objection to its use on the part of the Railroad Company. There were no signs warning the public off; nothing of that kind in those days. They commenced building on this street in 1881. * * * The south side of the track was mostly given to residences; and on the north side of the track, clustering around the depot, business houses sprang up there quickly, and parallel with the railroad was a well beaten road used by everybody—on both sides. * * * I have ridden over it many many times as a boy. Railroad Street on both sides was used habitually by the public as a street; that is all there is to it. * * * By the time of the fire in 1889, it was built on continuously through from Washington to Lincoln Street. I don't mean to say

it was solidly built up between those limits, but continuously."

FRANK JOHNSON:

"It has been used continuously, considerably by the public, as a thoroughfare; was even before I built this depot, because it was a well beaten road at that time. It was used on both sides of the track, but of course was used more on the north side than the south side. Up to 1889 it was built on in some blocks almost solid, in other blocks it was scattering. It was more fully built up on the north side. * * * By 1889 I should say the north side was continuously built up between Post and Mill. Some buildings had sidewalks and before others there were cinders. * * * The buildings I refer to all faced on Railroad Street."

W. S. NORMAN:

"When I came to Spokane in 1884, the north side of the track was an important street, as in all these towns, for small businesses such as hotels. I stopped at the Sprague House, which was on the corner, fronting on Railroad Street. * * * Up to the time of the fire Railroad Street within the limits I have described, had been used as a public thoroughfare by the public generally, and has been used ever since, in a confined form. Until a few weeks ago there was a roadway about sixty or eighty feet wide, between the service track to the warehouses and the main track."

On Cross Examination:

"The public got the understanding that Railroad Street as shown on the map was a public street from the fact that the buildings all faced the street and business was transacted there."

M. S. BENTLEY:

"In 1882 it was a street the same as the others. It was a street of the city, and was built on to some extent at that time. At the time of the fire in 1889, the north side of the street from Howard was pretty well built on. Then down below Monroe Street there were scattered houses pretty well down to where Browne's Addition starts. Up to 1889 there was never any obstruction to the free use of Railroad Street by the public, and I never heard of the Railroad Company making any objection to its use. I never saw any notices informing the public that it was not a street. With the exception of the depot and tracks it was unobstructed."

RUFUS MERRIAM:

"At the time I came here the north side of the street between Lincoln and Howard was pretty well built on by wooden buildings. On the other side there wasn't so many, but I think there were some warehouses on that side. The buildings on our block 14 did not face on Railroad Street; they faced Howard. The Todd Bottling Works on the opposite side of the street from us had a frontage on Railroad Street. During that period the street was pretty gen-

erally used from Lincoln or Monroe on the west to Stevens on the east. There were no objections whatever to the use by the public on the part of the Northern Pacific Railroad Company or anybody else. I never observed any signs or warnings against its use. There were no obstructions in the street up to the time of the fire."

D. M. DRUMHELLER:

"As to the condition of Railroad Street from the time it was platted down to 1889, practically all the travel and traffic from the main part of town went down Howard Street to the track and then down Railroad Street to the depot, backwards and forwards. The street was built on on and off from 1882 up to the fire. I don't know how many buildings there was. Each block was quite fully covered. I remember one block, Post and Lincoln, on the north side, that was practically covered with buildings of different kinds. On the south side, I don't remember any but two. As far as I know the general understanding was that Railroad Street was a street. It was always considered a street. We always designated it as a street and understood it as being a street. I never owned any property on this street. I don't remember that there was ever any obstruction to the use of the street before the fire except that at one time the railroad company attempted to block up Mill Street, but it was stopped. The railroad company never interposed any objection to the use of the street to my knowledge."

J. B. BLALOCK:

"It was used by the public generally as a highway up till 1889, and was built on from Monroe pretty much up to Howard Street, probably five or six blocks, I should think. * * * The general understanding and repute in the city as to Railroad Street was that it was a street the same as any other. There was lots of travel on it, there was business there. * * * I cannot say how many streets were more important than Railroad Street in 1889. Riverside Avenue and Howard Street were of more importance; I don't think that Main was of as much importance as Railroad Street, nor Front. I think Railroad Street had more business on the north side than there was on either side of Main Street, but taking both sides of Main Street, I suppose it had more business than Railroad Street. Up to the time of the fire in 1889, I don't think that Railroad Street was obstructed in any way other than by tracks and the depot. There was no attempt on the part of the Railroad Company to obstruct or prevent the travel on the street during that time."

On Cross Examination:

"By the importance of a street, I mean the amount of teams and vehicles and traffic that went over it. There were sidewalks on the north side of Railroad Street at the time of the fire. The sidewalks were in front of the business houses in the block below Post, I guess, I mean west of Post. This was built up solid with business houses. * * * I get the

impression that it was a public street and that there was a public belief that it was a street from the fact that it seemed to be used much. I don't remember just when, but I know it was said a long time ago it was dedicated as a street, that was also reported, yes. These two things put together made people think that it was a street."

THOMAS THWAITE:

"I was familiar with the condition of Railroad Street from 1884 to 1893. I had occasion to use that street in my business during that time. * * * They all used Railroad Street,—it was a street then. It was built on—had quite a few buildings. In 1889 it was all built on between Post and Lincoln, but not so much between Howard and Post; but there were some houses there; some few buildings there, stores. I am speaking of the north side. There were not many business houses on the south side, that I can remember. Taylor and Sharkie were there and Henry Brook, but I didn't go up there very much. As to the general character of the buildings on the streets: They were one and two story buildings, used for lodging houses. I think there was a hotel, a lunch counter, and I think a couple of saloons—two or three saloons, and a fruit stand. I don't remember that the street was obstructed in any way in 1889. I never heard of any effort made by the railroad company or any of their agents to prevent the use of the street by the public during any of that period. The

street was generally used from Stevens to Jefferson Street. * * * There were sidewalks in front of the business houses, and hitching rails to tie horses to."

GEORGE TURNER:

"When I came here in 1884, Railroad Street was built on to some extent on both sides. I remember very well the first building that I saw when I got off the train was the Sprague House. It stood facing Railroad Street, and there were more or less of business buildings on the north side of the street, and, as I remember it now, I think there were some buildings on the south side, although very sparse. The street was then being used by the public as a street, that use and the condition of buildings on the street continued up until 1889, at the time of the fire. At that time the north side was pretty well built up. * * * I know that it was pretty well built up from about Lincoln Street up to the neighborhood of Howard Street. Railroad Street was then used generally by the public as a thoroughfare as well for reaching the depot, which was down on Post Street as in reaching these buildings on each side of the street, for the purpose of ingress and egress, and also for the passage of vehicles east and west off Railroad Street."

On Redirect Examination:

"It has only been of late years—the last six to ten years—that they have undertaken to occupy the entire north side of the street to the exclusion of the

property fronting on the street. There never has been any obstruction at all on the south side, other than the railroad tracks on the south side of the street. That has always been open for travel, so far as it can be travelled consistently with use of the railroad tracks, and my recollection is that there has been only one switch track to the south, certainly so in the blocks between Stevens and Mill Streets, and possibly further west, leaving the entire width, almost, of the street there for public travel; and that is the case up to this time. The south side of the track, for the purpose of light and air and access, has been open continuously all the time, and is open at this time."

On Recross Examination:

"When I say the rest of the street on that side (the south side) has been opened, I mean that it has been opened in the sense that it has been left there for public travel if anybody wanted to travel it. It has never been occupied with anything, and has been traveled, and I have traveled it myself."

C. J. CRAIG:

"From 1882 to 1889 the street was generally used as a street, that was principally used by people coming from Browne's Addition into the city here. I used it nearly altogether. I would come up Railroad Street and then take a cross street to go down town. I used to see the other residents coming the same way frequently. The north side of Railroad Street was pretty well built on. There were a few houses on the south side. We didn't use Railroad Street very

much after the fire. The whole city was burned up and we traveled most any way. Up to the time of the fire, Railroad Street was not obstructed in any way, except by the tracks and the depot. There was no effort to prevent the public from using the street."

The only witnesses called on the part of the defendant who testified with reference to Railroad Street, were:

A. A. Newberry, Record, pp. 312 to 315; Francis H. Cook, pp. 316 to 318; Samuel Glasgow, pp. 318 to 320; C. G. Carpenter, p. 324; Edward C. Miller, pp. 341 to 343.

A. A. NEWBERRY:

"It is very difficult to tell in detail as to the settlement south of the track in 1883. I am a little cloudy about where the buildings were. My recollection is that what buildings were south of the track began fronting on Second Avenue, or Second Street as it is called here. There were a few residences, I think, one near Monroe, that fronted the other way.

* * * Going to the north side of the track prior to 1889, the Sprague House stood at Post, between Post and Lincoln, possibly in block 16. There were two or three little buildings between the Sprague House and Lincoln Street. My recollection is that Dr. Gandy owned them. There was a small saloon and I think a restaurant there. Thirty years ago is a good while to remember back in detail. * * *

As to travel along the railroad right of way during

the year 1883 and along there to 1889, anybody went pretty near anywhere they wanted to; they traveled along the right of way and whenever the cars happened to stop to discharge freight or anything of that kind they would drive up to them. It was not a graded street or anything of that kind, but we never followed any street when we came from down town going home. I think the Sprague House had a sidewalk in front of it and the building upon block 18 had a sidewalk in front also. As to travel on Railroad Street between 1883 and 1889, I don't recall that it was any more of a street than a great many of the blocks were."

On Cross Examination:

"I can't recall any hotel on the north side of Railroad Street, but the Sprague House. Might have been more. I think there was one west of that, but I am not positive. I can't answer as to the number of saloons. I can't recall what merchandise stores there were on the street. I wouldn't say there were not any. There were some agricultural implement people, something of that kind, before the fire, I recall. * * * It was a good while ago. I am pretty hazy as to the buildings that were on either side of the track."

FRANCIS H. COOK:

"I was familiar with Railroad Street. I don't remember that I ever heard it called by that name. We sometimes called it Railroad Avenue. I think it was to designate the vacant spot between First

Avenue and Second Avenue; that is my idea. * * * There was hardly anything in the way of improvements. This was right after the plot was laid out. From that time to the fire we traveled most anywhere. There wasn't any obstruction anywhere over the country. * * * The depot was west of Howard. We went where there was no resistance, and went that way up to the time of the fire, but not very much. At that time I had no business with the rest of the town. I was really a farmer. I remember the Sprague House. I don't recollect much about the street, but I remember the Sprague House."

On Cross Examination:

"There may have been buildings on the north side of the track between Stevens and Howard, but I don't recall to mind any. There may have been some between Howard and Mill, and between Mill and Post, and Post and Lincoln. I think there were buildings between Lincoln and Monroe. I guess those that were built, if they did not face the side streets, had to face the track if they were going to do any business. * * * I know people could drive parallel with the track, and did drive there for several blocks, within a space of 100 feet of the railroad track, something like that."

SAMUEL GLASGOW:

"As to the condition of the right of way from the time I came here in 1885, there were no streets; you could drive anywhere except where the rails were laid. There were really no streets; didn't know

where the streets were. * * * Between 1882 and 5 the railroad right of way had some warehouses on it on both sides. * * * The right of way was not used by the public in general unless they had business on the railroad track; that was what we used it for. * * * I remember a saloon immediately across from the old Northern Pacific depot about a hundred feet or more from it. I don't remember a hitching post. I remember a couple of little buildings beside it. I remember the Sprague Hotel."

On Cross Examination:

"Before the fire there were some buildings on the track on Railroad Street between Howard and Mill fronting on Howard. There were some buildings on the north side between Post and Mill Streets, facing the track. There were buildings between Post and Lincoln Street on the north side. I don't know that they faced the track, they might. * * * I guess there were some excises of cinder sidewalks on both sides of Railroad Street on Post; I guess that was the custom of the section men. * * * Anybody could drive along there from Howard to Lincoln. * * * There was a hide and fur depot in there; Behrend built that very early; I think 82 or 3. I think Taylor and Sharkie's place fronted on Howard Street, but can't swear to that. Looking at this picture (Defendant's Exhibit 30) I think it faces north. The fur depot referred to was on the north side of the track near Monroe."

C. G. CARPENTER:

"I came here in 87. At that time facing the depot there was a restaurant and saloon and I think they had some rooms upstairs, and some lodging houses in there, four or five buildings. That was in the block facing the depot. I don't think there were any sidewalks. * * * They could drive most anywhere. I don't remember whether they did or not."

EDWARD C. MILLER:

"First came here in 1881. * * * Came back here in 1884. Railroad Street in those days was used on both sides as a thoroughfare, people driving back and forth, going either west or east to the freight depot or passenger depot. The cars were left on the track to unload. As to the condition relative to driving down town, they could come up Post Street and cut across there near the Pacific Hotel, cut right across there at that time as it was all vacant, if I remember. * * * Other people besides those going to the depot could use it if they wanted to; could go anywhere they wanted to. Prior to the fire north of the track there was a small barber shop, restaurant and lodging house. South of the track was a string of residences, grocery stores, from Howard Street clear down to Monroe. They were way south of the track. * * * On the north side of the track across from the depot there was a saloon on the corner; next to that was a restaurant, then a barber

shop, then a restaurant. They got burned down at the fire."

It will be seen from the foregoing review of the testimony that there is practically no conflict as to the extent to which Railroad Street was improved at the time of the fire in 1889, although the recollection of some of the few witnesses for the defendant on that point is somewhat dulled by time. Nor is there any material conflict as to the character and extent of the travel on it. Two or three of the witnesses for the defendant, recollecting the early days, before there was much building anywhere, when it was the custom to cut across lots, thought that was the kind of travel to which Railroad Street was subjected. But if in 1889 Railroad Street was built on continuously, on both sides, although not solidly, except in certain blocks, and the testimony is overwhelming to that fact, it is putting too much of a strain on the credulity of the Courts to ask them to find that the travel on Railroad Street was of the cross lot variety. We insist in closing this branch of the case that the testimony establishes overwhelmingly a practical construction of the town plat in this case, on the part of the Railroad Company and the public, to the effect that that plat did dedicate and was intended to dedicate Railroad Street as one of the public streets of Railroad Addition to Spokane Falls. The finding of Judge Rudkin that the testimony on this branch of the case was consistent with an exclusive right of the Railroad Company in Railroad Street, was erroneous and cannot stand against the clear and convincing

implications of the testimony.

The defendant, in answer to this branch of complainants' case, presented to the Court below a line of authorities to the effect that an attempt to single out and reserve a right of way already in existence over land conveyed, must be construed as an exception, because a reservation must be of some new thing issuing out of the thing granted.

The principle was stated thus in *Whittaker v. Brown*, 46 Pa. St. 197:

"Thus it appears upon sufficient authority, that words of reservation may operate by way of exception, and to have any effect, must do so when the subject of the reservation is not something new created, as a rent or other interest strictly incorporeal, but is a thing corporate and *in esse* when the grant is made."

The argument founded on these authorities was that the Railroad Company owned a right of way over the north half of Section 19 before it made its town plat; that that was something already in existence when the town plat was made; and therefore, that that part of the dedicatory language of the plat referring to Railroad Street, must be construed as an exception rather than a reservation, because it was not a new right carved out but an already existing right which it was the intention to save and preserve.

To what extent these authorities were persuasive in inducing the holding of the Court below that the dedicatory language of the plat created an exception

and not a reservation, the opinion does not disclose. The authorities will no doubt be again presented in the brief of defendant, and that imposes on us the necessity of dealing with them in advance of their presentation and exposition. Without questioning the correctness of the principle or its proper application in the particular cases, we say it has no proper application in this case.

First: If we are right in the first proposition advanced in this brief, the Railroad Company owned the fee of the land embraced in Section 19, and the right of way attempted to be reserved over it was in fact a new right.

Second: The cardinal rule in all cases is to give effect to the intention of the parties, and the rule of construction in the cases referred to founded on the nature of a reservation, did give effect to that intention. But here the application of that rule would have a contrary effect. If the Railroad Company did not in fact own section 19 in fee it believed that it did, and the town plat was made on the theory that it could deal with that section of land and every part of it as the absolute and unqualified owner. Now where the parties deal with land on the theory that the grantor owns it all in fee and the intention is that the land itself shall pass by the grant with a reservation to the grantor of some new right issuing out of it, it would be to defeat the intention of the parties instead of effectuating it, to permit the grantor to say at a later period that the right attempted to be re-

served existed in him before the reservation and that the latter must therefore be construed as an exception.

“Though ‘exception’ and ‘reservation’ have been used promiscuously, it is well settled that, in giving construction to instruments, the intention of the parties is to be effectuated, and if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another, provided no rule of law is violated.”

Winthrop v. Fairbanks, 41 Maine 307.

“Under our system of conveyancing, treating all instruments as mere contracts, in which the intention of the parties is to be arrived at from the language used by them, in connection with the surrounding circumstances, the result in such a deed would be the same, whether the term were reservation or exception, and the distinction stated by the text writers is of no practical importance.”

Coal Creek Mining Co. v. Keck, 83 Tenn. 497.

The truth is the learning on the subject has but little, if any, place in the law of today as between grantor and grantee in a deed of conveyance. As between them the duty of the courts is to effectuate the intention of the parties and that forbids the giving an arbitrary effect to any clause in the deed. When the intent is found it is still referred to by the courts as creating an exception or a reservation, as the case may be, but that is mere matter of classification. The intent is not found by reason of the classification, but the classification, as mere matter of nomenclature, follows the finding of the intent. For col-

lateral purposes, however, the learning is still of consequence, as for instance, a covenant of warranty, of quiet enjoyment, covenants of ownership in insurance policies, and the like, between the grantor and third persons, may have been broken or been observed, accordingly as a particular clause in a deed of conveyance be construed as a reservation or an exception. Most of the cases relied on by defendant will be found to present questions of this latter character.

Third: The conveyances construed in the cases relied on by defendant undertook to convey the soil with an attempted reservation of the right of way. If in those cases the conveyances had been of the right of way, as it existed, with an attempt to reserve to the grantor a right to its use in common, we apprehend the courts would have found no difficulty in construing the attempted reservation as a good and effective reservation in law.

That is the case here, if in fact and in law, Railroad Street was laid out on the right of way of the Railroad Company instead of on land which it owned in fee.

Fourth: The cases laying down the rule of construction contended for by defendant, will all be found to be attempted reservations of known rights of way, existing over land of the grantor, in favor of third persons. Two technical distinctions enforce the rule that in such cases an attempted reservation must

be construed as an exception. One is that the right must be a new right and the other that the right must be reserved to the grantor. If it were possible, however, to conceive of a right of way existing in a grantor, and superimposed on his title in fee, there would be no difficulty in construing his grant, if such was the manifest intention, as a grant of the full fee in the land with a reservation to the grantor of the original right of way. The right reserved would be one inuring to the grantor and it would be one issuing out of the thing granted, since it would be gone by virtue of the grant if not reserved, something that could not be said of a right already existing in a third person.

Fifth: The cases on which defendant relies do not go to the extent of holding that an attempted reservation of an existing right of way must be construed as an exception of the soil covered by the right of way, but merely as an exception of the easement of the right of way over the soil. There may be an exception from the grant of a part of the estate, as well as an exception of a specific part of the soil.

Considered in that light, it is immaterial here whether the language of the dedicatory clause be treated as creating an exception or a reservation. In either case the exception or reservation must be construed in the same way, and the intention of the dedicator reached by the same process of reasoning, that is to say, what was it the grantor intended to except. If the dedicator intended to except from the grant

not the soil of Railroad Street, but the right to use Railroad Street for railroad purposes, it amounts to the same thing precisely as a reservation to use the street for those purposes. In both cases there is a dedication of the street with the right remaining in the grantor to use the street for the purposes indicated in the dedicatory plat.

We call attention in this connection to the well known rule that an exception repugnant to the grant is void. The illustration of the rule usually given is, a grant of twenty acres with an attempt to except one acre. That is said to be void because repugnant. But in a grant of a tract of land by metes and bounds, with an exception of one or more acres, the exception is said to be consistent with the grant and valid. By analogy then in a grant of lots one, two, three, four and five, of a certain block in a town plat, with an exception of lots two and three, the exception would be repugnant to the grant and void. By the same process of reasoning, in the grant of certain named streets to the public in a dedicatory plat (having the effect in this state of a quit claim deed), with an exception of one of the named streets from the dedication, the exception would be repugnant to the grant and therefore void. That is, if the exception be of the soil of the street. If, however, it be the exception of a right or easement in the street, and consistent with the dedication of the street, and with the use of the street by the public, it would not be repugnant and would be upheld as an exception.

We have thus far dealt with the abstract question of reservation or exception. It is necessary now to go a step further and determine if we can the nature and extent of the right reserved to the Railroad Company. That reservation was one to use Railroad Street "for the tracks and use of said Railroad Company."

This cannot be construed to mean any use to which the Company may see fit to put the street. The use to which the Company may put the street must be construed to be one consistent with the maintenance of the street as a street; otherwise the reservation would be void as inconsistent with the dedication.

Elliott on Roads and Streets (3rd Ed.), Section 163 and authorities cited.

13 *Cyclopedia of Law and Procedure*, p. 460
et seq.

City of Noblesville v. Lake Erie & W. Ry. Co.
(Indiana), 29 N. E. Rep. 484.

State ex rel Grinsfelder v. Street Ry. Co., 19
Wash. 532.

Oklahoma City & T. R. Co. v. Dunham, 39
Texas Civil App. 575; 88 S. W. Rep. 849.

Without considering other uses which may or may not be consistent with the principle last stated, we are concerned here with one proposed use only, namely, the placing in the street of an elevated structure which will occupy practically the entire street and render its use as a street impossible. Manifestly

that cannot be considered as one of the uses authorized by the reservation.

The railroad uses which are consistent with the continuance of the street as a street, are illustrated by the New York elevated railroad cases:

Story v. N. Y. El. R. Co., 90 N. Y. 122.

Lahr v. Met. El. Ry. Co., 104 N. Y. 268; 10 N. E. Rep. 528.

Forbes v. Rome W. & O. R. Co. (N. Y.), 24 N. E. 919.

Also by:

City of Noblesville v. Lake Erie & W. Ry. Co.,
supra.

Aldis v. Union El. R. Co. (Illinois), 68 N. E. Rep. 95.

Ayers v. Penn. R. Co., 3 Atlantic Rep. 885.

Also by:

Muhlker v. Harlem R. Co., 197 U. S. 544.

The last case is particularly valuable in considering the uses that may be made of Railroad Street under the reservation because it deals with the incidents attaching to public streets which belong to and give value to abutting properties.

It has been asked, of what value can Railroad Street be to abutting properties if the Railroad Company can occupy all of it with its tracks on the surface, and thereby effectually destroy its capability for purposes of travel and of access? It would be a doubtful question if the multiplication of tracks would have the effect stated, whether the Railroad Company could increase its tracks indefinitely, even on the surface, and in that case the better view would be that

it is confined to the tracks shown on the town plat. But the presence of tracks in the street, while it may impair the street for purposes of travel and access, does not destroy the street for those purposes. By paving flush with the tracks inside and outside the rails, Railroad Street would be valuable to the public both for travel and for access to abutting lots, no matter how many switch tracks were laid in the street. But passing all that by and assuming that the Railroad Company may multiply its tracks with the effects stated, there are other incidents of a street than travel and access. Those of light and air are often quite as valuable and important as that of access, as declared by the Supreme Court in the Muhlker case. So that without reference to the surface use of Railroad Street, there are still other uses which attached to abutting property on the dedication of that street and which may not be destroyed without legislative authority and without the making of compensation

As stated by the Court in the Muhlker case:

"It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as access. There is something of mockery to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the state, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house."

FOURTH.

Did the conduct of the Railroad Company and the public, in the use of the street for a period of nearly ten years, effectuate a common law dedication of the street to the public?

The evidence showing the extent and duration of the use of Railroad Street by the public, with the knowledge and consent of the Railroad Company, was set forth and considered in connection with the question of statutory dedication, and we will not duplicate that part of our brief. We repeat that that evidence establishes the user of Railroad Street by the public, with the knowledge and consent of the Railroad Company, and we now add, by its active procurement, for nearly ten years, or from the 20th day of January, 1881, to the 4th day of August, 1889. The user, to be accurate, was not terminated on the last named date, but it is fixed as of that date because then the great fire occurred, destroying the buildings on Railroad Street along with those on the other streets of the city, and thereafter for several years in building up the city, Railroad Street was cluttered up with building material transported by the Railroad Company, and was more or less obstructed by the Company without much attention being paid to the matter by the public. And soon thereafter, instigated no doubt by the toleration of its conduct during the period of exigency, it conceived the idea of encroaching on the street, on the north side, with warehouses. This encroachment has been gradual, and most of it

has taken place within the last eight or ten years, but nevertheless it is generally referred to as contemporaneous with the fire. However, the encroachment of the warehouses, has left an open space extending from the south front of the warehouses to the south line of Railroad Street, approximately 125 feet in width, and the testimony shows that this open space has always been open, is open to this day, and that it has always been traveled by the public. But leaving all that out of consideration, we say that the user of the street shown between the two dates mentioned, establishes a common law dedication of Railroad Street, even if, by reason of a supposed exception in the plat of Railroad Addition, that street was not dedicated by the statutory plat.

The vital principle underlying dedication is the intent to dedicate,—

Elliott on Roads & Streets (3rd Ed.), Sections 138-39-40-41.

McQuillan on Municipal Corporations, Section 1561 and authorities cited.

“The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted on by the public, the owner cannot, after acceptance by the public, recall the appropriation.”

Elliott, Section 138.

“However, the statement that there must

always be an intent to dedicate is not wholly correct, at least if the word *intent* be taken in the sense of an actual intent, inasmuch as the basis of a common law dedication often rests on mere conduct of the owner of land relied on by others to their injury so as to constitute an estoppel *in pais* against the owner, and effectuate a dedication notwithstanding that there was never in the mind of the owner any actual intention to dedicate, the theory being that the owner must intend the reasonable and necessary consequences of his acts."

McQuillan, Section 1561 and note 81.

Intent to dedicate may be shown by user and user need not be for any particular period of time,—

Elliott on Roads & Streets (3rd Ed.), Sections 177 and 178 and authorities cited.

McQuillan on Municipal Corporations, Section 1565.

Dillon on Municipal Corporations (5th Ed.), Section 1081.

The doctrine is thus summed up by Mr. Elliott in section 177 of his work,—

"User by the public may be of importance both as evidence of an intent to dedicate and as evidence of acceptance. Here we are considering it chiefly as evidence of an intent to dedicate, although it may at the same time be evidence of acceptance, and thus of a complete dedication. Some of the English cases have attached too much importance to the element of time, which enters so largely into all questions of dedication. In one case an uninterrupted user of eight years was held sufficient without reference to the question of intention, Lord Kenyon saying, 'During all that time the public at large were permitted to have the free use of the way without impediment whatever, and therefore it is now too late to assert the right, for there is quite a sufficient time

for presuming a dedication of the way to the public. In a great case which was much contested, six years was held sufficient.' In another case the use was for six years, and it was held that made at least a *prima facie* case of dedication. In still another case the use was for five years, and the Court declared that it precluded the owner from reclaiming the land. There are, however, English cases which assert a different doctrine and refuse to adjudge a dedication unless there has been a use for a very much longer period of time. While it is true that some of the English cases, and perhaps some of the American, have attached undue importance to the element of time, and too little to that of the owner's intention, it is equally true that there are other cases which have refused it that importance which it deserves and have erroneously held that uninterrupted user, no matter what its character, will not sufficiently evidence a dedication unless it has continued for twenty years. The remark of Mr. Woolrych, that, 'It is, therefore, rather the intention of the owner than the question of time which must determine the dedication,' is a correct general statement of the law, but like most general statements, it requires some limitation. It is the rule that there must be evidence of intention, but the user itself may be of such a character as to supply a foundation for an inference of the intention to dedicate. Thus, if the use made of the way is such as could only be rightfully made of a public road or street, and is so open and notorious and so unequivocal in character, and so long continued, also, that the discontinuance of the way would seriously injure the public, the intention to dedicate may be presumed against the owner."

Among the cases cited by Dillon to the proposition last stated is that of *Woodyer v. Hadden*, 5th Taunt. 125, in which case it was said,

“No particular time is necessary for evidence of a dedication. If the act of dedication be unequivocal, it may take place immediately. For instance, if a man build a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway.”

The facts of this case are so nearly those of the suppositious case put by the Court in 5th Taunton, that the language of the Court may be paraphrased without doing violence to its sense, as, for instance,

“If a man sells lots on an open space belonging to him, suitable for a street, and permits the same to be built up on each side with houses fronting thereon, the open space is instantly a highway.”

A common law dedication may be accepted by user of the public and no definite time is necessary to show such acceptance,—

Elliott on Roads & Streets (3rd Ed.), Sections 170-171.

McQuillan on Municipal Corporations, Section 1582 and notes.

Seattle v. Hinckley, 67 Wash. 276.

It would be tedious and pedantic to cite the multitude of cases collected by the text writers and cited by them to these several propositions. The Court will see when it examines the text books, that the propositions stated by them are amply sustained by the adjudged cases both in this country and in England.

If “the use of this strip of land from 1881 to 1889 was but natural under the circumstances,” as

found by the learned Judge below, then the head notes to *Hogue v. City of Albina*, 10 L. R. A., 673, quoted in the opinion, was quite sufficient to sustain his decision that that use was wholly insufficient to constitute a common law dedication. But if that use was in the highest degree unnatural, except on the theory that the strip of land was intended to be devoted to public use as a street, then the principles to which complainants appeal must prevail, and there was a common law dedication.

On this branch of the case we are not troubled by the dedicatory language attached to the statutory plat. We are considering the case now as if that language excepted Railroad Street from dedication. If there was a later dedication of that street by parol, the case is in the same attitude as if there had been no statutory plat and no exception of Railroad Street therefrom.

No doubt the open and visible use of the street by the Railroad Company during the time that its conduct was ripening into a common law dedication, would impress a continuance of that use on the street; so that we are brought back to the situation created by the statutory dedication, namely, that the Railroad Company retained a right to use the street for railway purposes in a manner not inconsistent with its continued existence as a street.

This brings us to a consideration of the effect of the evidence showing the encroachment of the Rail-

road Company with its warehouses on the north side of Railroad Street, beginning shortly after the fire of 1889 and continuing progressively down to the present time. That evidence was objected to by complainants and was received by the Court subject to the objection. Complainants say that it has no proper place in the case.

First: There either had or had not been a statutory or common law dedication of Railroad Street before the fire, and if there had been either kind of dedication, then subsequent encroachments on the street by the Railroad Company or its lessees was immaterial. After dedication is established the owner cannot impair the same by subsequent acts or declarations. The conduct and declarations which are receivable to rebut dedication are such only as preceded the acquisition of the right,—

Elliott on Roads & Streets (3rd Ed.), Section 186 and authorities cited.

If then the dedication of Railroad Street was complete in 1889, subsequent acts of occupancy of a part of the street by the Railroad Company, can have no influence on the question whether there was or was not a dedication of the street.

Second: No issue of abandonment or estoppel to which such evidence might have been pertinent, was tendered by the answer. Moreover, if any such issue had been tendered, it would have been insuffi-

cient as a bar. It is the settled law of the state of Washington, that mere lapse of time, even with the added incident of payment of taxes, does not legalize an obstruction in a public street,—

West Seattle v. West Seattle Land Company, 38 Washington 359.

The Court in the case last cited in reaching its conclusion relied on the doctrine laid down by Dillon and Elliott, and quoted from the latter as follows:

“The doctrine that highways cannot be lost by adverse possession is supported by other well settled principles of the law. There can be no rightful permanent private possession of a public street. Its obstruction is a nuisance, punishable by indictment. Each day’s continuance thereof is an indictable offense, and it follows, therefore, that no right to maintain it can be acquired by prescription. Municipal corporations have no power to alien or dispose of their streets for any purpose inconsistent with their use as highways. It would be a grave reproach to the law to permit a wrongdoer, one who is daily violating the law of the state itself, to take advantage of his own wrong and that of the municipality, and by such indirect and wrongful means obtain a right to the street which the corporation is prohibited from directly granting or destroying.”

See further in support of the position:

Elliott on Roads & Streets (3rd Ed.), Sections 1188, 1189.

Dillon on Municipal Corporations (5th Ed.), Sections 1187 to 1194, and note to 1194.

Third: The encroachments are entirely on the north side of the street, leaving an open space between them and the south side of the street of approximately 125 feet, and it is upon this open space that the addi-

tional encroachment of the elevated structure is proposed to be placed. The properties of three out of the four complainants abut on the south side of the street. It will not be contended, we apprehend, even if the question of estoppel were in the case, that there is any principle which entitles a trespasser in a public street to insist that his partial encroachment on the street should be given the effect of an estoppel against the public or against individuals to complain against further and additional encroachments which would completely close up the street.

FIFTH.

Did the ordinance of the city of Spokane, pleaded by defendant, justify the use and occupation of Railroad Street by the defendant, if that street was in fact a public street?

Complainants say not. If the strip of land in question be a street, then the city of Spokane was incapable of authorizing the structure which defendant is proceeding to build,—

State ex rel Schade Brewing Co. v. Superior Court, 62 Wash. 96.

State ex rel Sylvester v. Superior Court, 64 Wash. 594.

Even if it were within the police power of the city to authorize the occupancy of the street with the structure aforesaid, defendant could not proceed without making compensation to abutting owners, and it is immaterial whether the authority was conferred by a permissive or mandatory ordinance,—

Muhlker v. Harlem R. Co., 197 U. S. 544.
McKeon v. N. Y., N. H. & H. R. Co. (Conn.),
 61 L. R. A. 730; 53 Atlantic Rep. 656.
McElroy v. Kansas City, 21 Federal Rep. 257.
DeLucca v. City of North Little Rock, 142 Federal Rep. 600.

SIXTH.

Is there legal force in the contention that the city of Spokane is an essential party to the litigation?

The answer alleges that in and by the ordinance pleaded by it, the city is proposing to change the grade of its streets where they cross the railway, and that grade separation is necessary to enable it to do that; and hence, to enjoin the Railway Company from making grade separation is, in effect, to enjoin the change in the grade of the streets. Therefore the city is a necessary party.

These allegations put the cart before the horse. In and by section 8 of the ordinance "the city of Spokane undertakes forthwith upon the acceptance of this ordinance, by the necessary proceedings to legally establish the changes in the grades of the streets, avenues and alleys specified in section 6 hereof."

(Record, p. 48.)

The city merely agrees to establish grades in the cross streets so as to give the clearance provided for in the overhead structure. If the latter be enjoined there will be no necessity for it to carry out the stipulation which it makes with the defendant in and by section 8 of the ordinance.

Moreover, the claim that the defendant is proceeding under a mandatory ordinance of the city is the merest sham and pretense. The defendant drew the ordinance, sent one of its principal officers to Spokane to secure its passage by the City Council, and insisted as a condition of its acceptance that the ordinance be made mandatory in character.

Testimony of George Turner, Record, pp. 277 to 279.

Testimony of Thomas A. Geraghty, Record, pp. 303 to 306.

However, it still desired a loophole of escape, and inserted the following section in the ordinance:

"Section 23. The Railway Company shall accept the terms and conditions of this ordinance within 45 days after its passage, by filing with the City Clerk of said city of Spokane, a written acceptance of the same, and if not accepted within that time, said ordinance shall be null and void unless further time be expressly given by the City Council."

Record, p. 54.

How an ordinance which may be accepted or rejected at pleasure, can be considered a mandatory ordinance, we leave to defendant to explain.

Even if the ordinance were in fact mandatory, the private corporation is still acting under its corporate power in obeying the public command, and must answer to third persons for its acts or proposed acts,—

Muhlker v. Harlem R. Co., 197 U. S. 544.

McKeon v. N. Y., N. H. & H. R. Co. (Conn.), 61 L. R. A. 730; 53 Atlantic Rep. 656.

Whenever it appears that the change in the grade

of streets is not made solely for the public accommodation, the railroad making it must answer for the consequences,—

Pittsburg, C., C. & St. L. Ry. Co. v. Atkinson (Ind.), 97 N. E. Rep. 353.

Chicago, I. & L. Ry. Co. v. Johnson (Ind.), 90 N. E. Rep. 508.

Parties in the Federal Courts are divided into those that are proper, necessary and indispensable. Proper or necessary parties may be omitted when it would oust the jurisdiction of the Court to join them.

Equity Rule 39.

Simpkins Federal Suit in Equity, 226 *et seq.*

Barney v. Baltimore City, 6 Wallace 284.

Mackay v. Gabel, 117 Federal Rep. 877.

Under the foregoing rule, parties equally interested in the litigation may be omitted, if to join them would oust the jurisdiction, provided decree can be made without prejudice to their rights,—

Hotel Co. v. Wade, 97 U. S. 20.

A party so omitted may come in by petition without ousting the jurisdiction, and this special rule gives force and strength to the general rule,—

Hotel Co. v. Wade, *supra*.

Simpkins, Section 235.

The following cases illustrate the rule:

Subjecting party defendant to possible double liability,—

Williams v. Bankhead, 19 Wallace, 570.

Omitting one of several distributees of an estate,—

Payne v. Hook, 7 Wallace 431.

Omitting persons connected with others in a chain of title, against whom an action is brought to quiet title,—

N. C. M. Co. v. Westfeldt, 151 Federal 295.

Omitting beneficiary in suit by one to compel another to specifically perform contract for benefit of the beneficiary,—

Rogers v. Penobscot M. Co., 154 Federal 610.

Omitting grantee in a deed sought to be set aside on the ground of fraud in its procurement, where grantee has passed title to a third person, who is made defendant, the allegations of the bill being that the original transaction was for the benefit of the third person,—

Donovan v. Champion, 85 Federal 72.

Omitting other heirs in suit by one heir to set aside will and deed on the ground of fraud,—

Williams v. Crabb, 117 Federal 193.

Omitting grantor as party in suit to set aside grantor's deed.

Mackay v. Gabel, 117 Federal Rep. 877.

California v. So. Pac. Co., 157 U. S. 229, states nothing to the contrary of these decisions. That was a case of original jurisdiction in the Supreme Court. The practice in such cases is governed by the third rule in equity, making former practice in the King's Bench and Chancery outlines for practice in the Supreme Court.

In the following State cases it was held that the city was not a necessary party in suits to enjoin obstruction of streets proceeding under authority of the city,—

State v. Judy, 27 So. Rep. 580.

Florida East Coast Ry. Co. v. Warley, 38 So. Rep. 623.

In the most damaging aspect of the case, it can only be said that the Railway Company is carrying out the mandate of the city, and to that extent represents the city. But it has long been the settled doctrine of the Supreme Court that an agent of the state may be sued alone to enjoin carrying out the void mandate of the state, because a state itself could not be made a party without ousting the jurisdiction of the Court,—

Osborne v. U. S. Bank, 9 Wheaton 738.

Virginia Coupon Cases, 114 U. S. 269.

In re Ayers, 123 U. S. 512.

Complainants respectfully submit that the decree of the lower Court was erroneous, and that they are entitled to the relief prayed for in their several complaints.

Respectfully submitted,

TURNER & GERAGHTY,
POST, AVERY & HIGGINS,

Solicitors for Plaintiffs.

TOWN PLAT

- OF -

RAILROAD ADDITION

Spokane Falls.

The attached plat contains a description and description of the Railroad Addition to Spokane Falls in Spokane County Washington Territory laid out by the Northern Pacific Railroad Company in Section 10 Township 43 North Range 42 East in the Williams Meridian and situated upon the North Half of said Section 10 shown upon said plat.

The width of streets and alleys and also of lots and blocks shown in this plat are in accordance with the following:

The streets shown upon said plat are dedicated to the public use of the public and are shown upon the plat of said plat of said plat designated as Railroad Street which is reserved for the blocks and use of said Railroad Company.

John W. Sprague
General Superintendent and Agent
Northern Pacific Railroad Co.

Witness my hand and seal
County of Spokane S.J.

Be it remembered that on the 20th day of December AD 1880 before me the undersigned Notary Public in and for said County and Territory came the Northern Pacific Railroad Company by John W. Sprague its duly appointed and constituted agent personally and for and in behalf of the said Northern Pacific Railroad Company acknowledged the foregoing and annexed Town Plat of Railroad Addition to Spokane Falls as and for the act and deed of the said Northern Pacific Railroad Company.

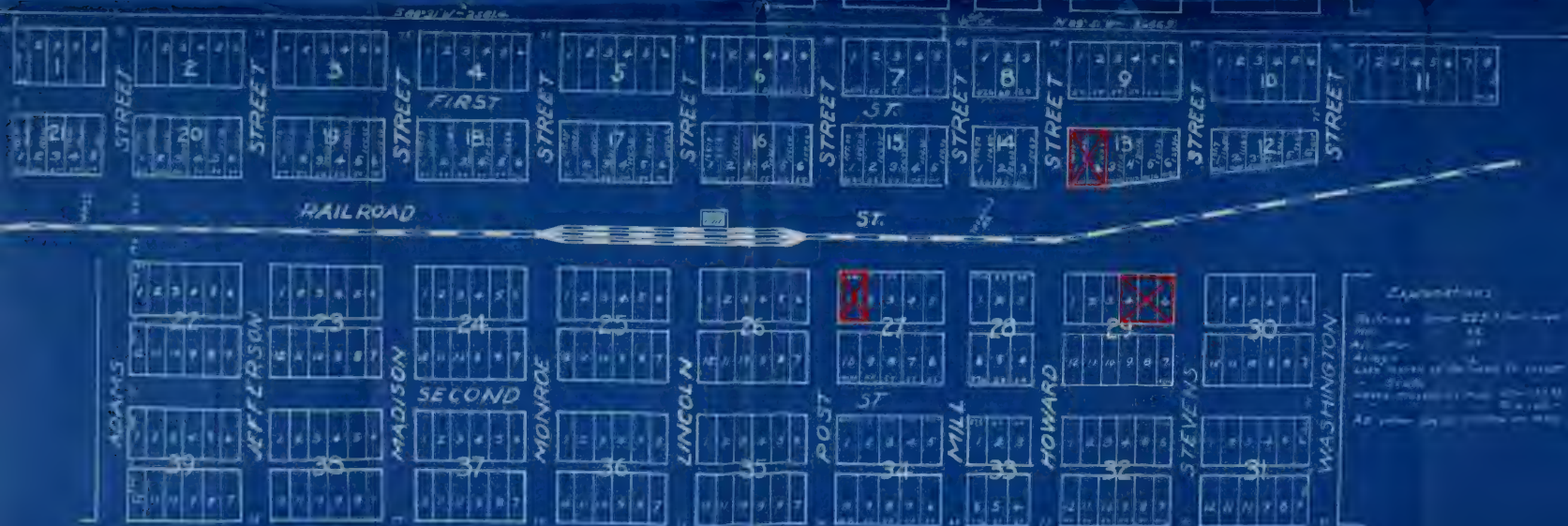
WITNESSE my hand and material seal the day and year therein first above written.

E.E. Cooper
Notary Public
Washington Territory

E.E. Cooper
Notary Public

Recorded in Record of Town Plats of Spokane County Washington Territory
January 27th 1881

W.H. Bishop
County Auditor



Examination
By the County Auditor
Attest
W.H. Bishop
County Auditor

